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No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ENTERTAINMENT PRODUCTIONS, INC., et al.,

Petitioners,

—v.—

SHELBY COUNTY, TENNESSEE, INC., et al.,

Respondents.

ROBERT C. COOPER, JR., ATTORNEY GENERAL,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I Is the Tennessee Adult-Oriented Establishment Registration Act, Tenn. Code Ann. § 7-51-1101 et seq., the plain text of which extends the prohibitions of the Act into mainstream artistic venues, and plainly reaches mainstream dramatic and dance performances – and which by its plain terms prohibits nudity, semi-nudity, and the appearance, on stage, of one performer within six feet of another, as well as any physical contact between performers, as well as certain sorts of self touch – unconstitutionally overbroad, in violation of the First Amendment:

A. Because the Act, by its plain text, extends it prohibitions to mainstream performance venues and to mainstream dramatic and dance performances with neither a demonstrated nor even an alleged connection to the adverse secondary effects that are attributed to adult expression?

B. Because the Act, by its plain text, constitutes an outright ban on nudity, which sweeps within its reach a variety of both mainstream artistic performances and artistic venues, and is thus overbroad on its face, in a manner which the Court did not have occasion to address in either *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), or in *Barnes v. Glenn Theatre*, 501 U.S. 560 (1991)?

QUESTIONS PRESENTED FOR REVIEW
Continued

2. Did the Sixth Circuit Court of Appeals err in saving the contested Act from an overbreadth challenge, by narrowly construing the Act in a manner radically inconsistent with both the content and the meaning of its plain text, in a manner which presents an important question as to the limits to which a federal court is subject in construing a statute generally, in light of the decision, this term, in *United States v. Stevens*, ___ S.Ct. ___, 78 U.S.L.W. 4345 (U.S., April 28, 2010), and particularly in interpreting a state statute, consistent with *Virginia v. American Booksellers, Inc.*, 484 U.S. 383 (1988)?

3. Did the Sixth Circuit Court of Appeals err in finding that the contested Act did not fail First Amendment scrutiny, notwithstanding the fact that the uncontroverted record evidence demonstrated that its application would result in a substantial reduction in the quantity and accessibility of adult expression in the City of Memphis, thereby violating the "proportionality requirement" set forth by Justice Kennedy in his concurrence in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002), the proper application of which poses an important and undecided question upon which this Court should rule?

LIST OF THE PARTIES

The parties to the proceedings in the lower court were Entertainment Productions, Inc., a Tennessee Corporation, dba Christie's Cabaret; Platinum Rose, Inc., a Tennessee Corporation dba Platinum Rose; 777 Memphis, Inc., a Tennessee Corporation dba The Gold Club; Manhattan, Inc., a Tennessee Corporation, dba New York, New York; Tennessee Entertainment Concepts, Inc., a Tennessee Corporation dba The Pony; 2882 Lambs Place, L.L.C., a Tennessee Limited Liability Company, dba The Jet Strip; 600 Marshall Entertainment Concepts, L.L.C., a Tennessee Limited Liability Company, dba Downtown Dolls; Shelby County, a Political Subdivision of the State of Tennessee; the City of Memphis, a Tennessee Municipal Corporation, and; Robert E. Cooper, Jr., Intervenor, in his Official Capacity as the Attorney General of the State of Tennessee.

CORPORATE DISCLOSURE STATEMENT

The corporate parties to this action are Entertainment Productions, Inc., Platinum Rose, Inc., 777 Memphis, Inc., Manhattan, Inc., Tennessee Entertainment Concepts, Inc., 2882 Lambs Place, L.L.C., and 600 Marshall Entertainment Concepts, L.L.C.

Pursuant to Supreme Court Rule 29.6, Petitioners state that no publicly traded company owns stock in any of these corporate parties, nor do any of the corporate parties have a parent corporation.

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PETITION FOR A WRIT OF CERTIORARI

Entertainment Productions, Inc., Platinum Rose, Inc., 777 Memphis, Inc., Manhattan, Inc., Tennessee Entertainment Concepts, Inc., 2882 Lambs Place, L.L.C., and 600 Marshall Entertainment Concepts, L.L.C. hereby petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals denying Petitioners' Petition for Rehearing and Rehearing En Banc is set forth in the Appendix at App. 78-79.

The opinion of the Court of Appeals is reported at 588 F.3d 372 (6th Cir. 2009), and is set forth in the Appendix at App. 1-42.

The opinion of the United States District Court for the Western District of Tennessee at Memphis is reported at 545 F.Supp.2d 734 (W.D.Tenn. 2008), and is set forth in the Appendix at App. 46-77.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on November 25, 2009. The order of that court denying rehearing and rehearing en banc was entered on March 2, 2010. This petition is being filed within ninety days of the order denying rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The First Amendment and Fourteenth Amendments to the Constitution of the United States are reprinted in the Appendix to this Petition at App. 80-82. Relevant portions of the Tennessee Adult Oriented Establishment Registration Act, Tenn. Code Ann. §§ 7-51-1102(2), (3), (6), (24) and (27), 7-51-1109 (a)(5), and 7-51-1114 are reprinted in the Appendix hereto at App. 83-88. Shelby County, Tennessee County Ordinance 344 is reprinted in the Appendix hereto at App. 89-94.

STATEMENT OF THE CASE

Shelby County, Tennessee, has locally adopted the Tennessee Adult Oriented Establishment Registration Act, Tenn. Code Ann. § 7-51-1101 et seq., which by its plain language restricts the content of live performances in both adult and traditional performance venues.[1]

The Sixth Circuit construed the Act narrowly, and in doing so, went to extraordinary lengths to redeem it from the patent overbreadth inherent in its text. But – as we shall demonstrate later in this Petition – the construction imposed on the Act by the Court of Appeals simply cannot be squared with the language chosen by the General Assembly that drafted it.

In this light, we urge the Court to assess our overbreadth claims based on the plain text of the Act itself, and not the fanciful construction imposed upon it by the Court of Appeals below.

Under the Act, nudity, partial nudity, certain sorts of sexually suggestive movement and self touch, and contact between performers are prohibited not only in adult cabarets and adult oriented establishments – terms which the Act defines with exceptional breadth – but in any performance venue in which adult entertainment, as that term is expansively defined by the Act, is performed, including in mainstream artistic venues.

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[1]The effective date of Ordinance 344 was January 1, 2008. App. 93. It has not yet been codified. For clarity, we will refer to the discrete sections of the ordinance using the codification imposed under the Act, and to be consistent, we will refer to the Act in discussing its provisions.

The Scope of the Act

There are several paths by which a venue can become subject to the requirements of the Act.

One is to be an adult cabaret, a term of art under the Act which includes more, on its face, than common parlance would suggest.[2]

The definition of adult cabaret has two obvious parts. The first sentence applies only to places which have, as one of their principal uses ("as a principal use," to quote the Act) the presentation of entertainment in which certain anatomical areas are exposed. The second sentence quoted below – which notably contains no principal use requirement – lists a specific number of other performances, the presentation of which will, on their own, suffice to make a venue an adult cabaret.

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[2] Under the Act:

> Adult cabaret" means an establishment that features as **a principal use** of its business, entertainers, waiters, or bartenders who expose to public view of the patrons within such establishment, **at any time**, the bare female breast below a point immediately above the top of the areola, human genitals, pubic region, or buttocks, **even if partially covered by opaque material or completely covered by translucent material, including swim suits, lingerie, or latex covering.** "Adult cabaret" includes a commercial establishment that features entertainment of an erotic nature, including exotic dancers, strippers, male or female impersonators, or similar entertainers;

TENN CODE ANN. § 7-51-1102 (2)(emphases added).

Another path to regulation under the Act is to be an adult-oriented establishment.

The Act lists examples of such establishments, and provides an open-ended method to determine whether a given establishment is adult-oriented, which captures both venues that are subdivided into small viewing rooms and places in which adult entertainment is presented to the public for profit.[3]

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[3] Under the Act:

> "Adult oriented establishment" includes, **but is not limited to**, an adult bookstore, adult motion picture theater, adult mini-motion picture establishment, adult cabaret, escort agency, sexual encounter center, massage parlor, rap parlor, sauna; further, "adult-oriented establishment" means any **premises to which the public patrons or members are invited or admitted** and that are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises for the purpose of viewing adult-oriented motion pictures, **or wherein an entertainer provides adult entertainment to a member of the public**, a patron or a member, when such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect. "Adult-oriented establishment" further includes, without being limited to, any adult entertainment studio or any premises that is physically arranged and used as such, whether advertised or represented as an adult entertainment studio, rap studio, exotic dance studio, encounter studio, sensitivity studio, model studio, escort service, escort or any other term of like import;

TENN CODE ANN. § 7-51-1102 (6)(emphases added).

Under the Act, adult entertainment, the presentation of which will suffice to make a venue adult-oriented, is also a broadly defined term of art.[4]

Under Section 1102(3), whether a given performance constitutes adult entertainment turns on several things, including the content of what the Act terms one principal or predominant theme, emphasis or portion.[5]

If such a theme or portion of a given performance is the depiction of actual, or even simulated specified sexual activities, than the presentation amounts to adult-oriented entertainment under the Act.[6]

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[4]Under the Act:

> "Adult entertainment" means any exhibition of any adult-oriented motion picture, live performance, display or dance of any type, that has as a principal or predominant theme, emphasis, or portion of such performance, any actual or simulated performance of specified sexual activities or exhibition and viewing of specified anatomical areas, removal of articles of clothing or appearing unclothed, pantomime, modeling, or any other personal service offered customers;

Tenn Code Ann. § 7-51-1102 (3).

[5]We stress that the content, on the face of the Act, need not be the only theme, portion or emphasis of the performance, but only "a principal or predominant one" among several. Tenn. Code Ann. § 7-51-1102 (3).

[6]Under the Act, specified sexual activities include the following actual or simulated acts:

If it includes the depiction of specified anatomical areas, a performance is adult-oriented under the Act.[7]

Combined, these definitions provide myriad and diverse paths to inclusion under the Act.

(A) Human genitals in a state of sexual stimulation or arousal;

(B) Acts of human masturbation, sexual intercourse or sodomy; or

(C) Fondling or erotic touching of human genitals, pubic region, buttocks or female breasts.

Tenn Code Ann. § 7-51-1102 (27).

[7]Under the Act, the specified anatomical areas the **actual or simulated** exposure of which make a performance adult oriented are:

(A) Less than completely and opaquely covered:

(i) Human genitals;

(ii) Pubic region;

(iii) Buttocks; and

(iv) Female breasts below a point immediately above the top of the areola; and

(B) Human male genitals in a discernibly turgid state, even if completely opaquely covered;

TENN CODE ANN. § 7-51-1102 (24)(emphasis added).

The Restrictions Imposed by the Act

While several paths can bring an establishment within the reach of the Act, any establishment thus regulated is prohibited from presenting entertainment with a wide variety of mature and erotic content.

Entertainers are prohibited from appearing in a state of nudity, a state which is broadly defined, for purposes of that prohibition, to include even a glimpse of the bare female breast.[8]

Wherever the Act applies, entertainers may not come within six feet of the audience while performing.[9]

Even more draconian is the requirement that a performer must not touch, or even come within six feet of another performer during a performance.[10]

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[8]The nudity thus prohibited is defined to include:

> the showing of the human male or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

TENN. CODE ANN. 7-51-1114(d)(2).

[9]TENN. CODE ANN. § 7-51-1114(c).

[10]The Act contains this prohibition:

> No entertainer, employee, or customer shall be permitted to have any physical contact with any other on the premises during any performance and

Entertainers who perform in establishments subject to the Act are prohibited from engaging in certain sorts self-touch during a performance.[11] Under the Act:

> No operator, entertainer or employee of an adult-oriented establishment shall encourage or permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any operator, entertainer or employee.

TENN. CODE ANN. § 7-51-1114(b).

Finally, the sale, service and consumption of beer or any alcoholic beverages in adult licensed premises is altogether forbidden under the Act.[12]

> all performances shall only occur upon a stage at least eighteen inches (18") above the immediate floor level and removed at least six feet (6') from the nearest entertainer, employee, or customer.

Tenn. Code Ann. § 7-51-1114(c).

[11]The Act provides:

> No employee or entertainer, while on the premises of an adult-oriented establishment, may:
>
> * * *
>
> (D) Fondle such person's own genitals or those of another.

Tenn. Code Ann. § 7-51-1114(d)(1).

[12]Tenn. Code. Ann. § 7-51-1109(a)(5)(permitting consumption of intoxicating beverages on premises a basis for license revocation).

The Enforcement Provisions

The Act requires every adult-oriented establishment to obtain a license before operating in any county which has adopted it locally. Tenn. Code Ann. §§ 7-51-1104(a).

Violations of the Act can not only result in the suspension or revocation of a license, but are also misdemeanor crimes as well.[13]

The District Court Proceeding

Each of the Plaintiffs operates a nightclub within the City of Memphis, in Shelby County, at which erotic dance performances are presented as entertainment.

In January 2008, the Plaintiffs filed suit in the district court, seeking declaratory and preliminary and permanent injunctive relief prohibiting the City of Memphis and Shelby County from enforcing the Act against them.

Plaintiffs alleged, inter alia, that the Act is vague and overbroad, and would impermissibly limit the quantity and availability of adult expression in Memphis, all in violation of the First and Fourteenth Amendments. 28 U.S.C. §§ 1331, 1343(a)(3) and (4), 2201 and 2202, and 42 U.S.C. §§ 1983 and 1988.

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[13] TENN. CODE ANN. § 7-51-1109(a)(2) (authorizing suspension, revocation and annulment of licenses for violations of the Act itself) and § 7-51-1119(a)(1) (making first violation of the Act a Class B misdemeanor) and (2) making subsequent offenses Class A misdemeanors.

The district court held a hearing on the preliminary injunction motion on April 11, 2008.

At that hearing, the Plaintiffs presented the testimony of Judith Lynn Hanna, Ph.D., a cultural anthropologist at the University of Maryland whose academic expertise involves the history, nature and communicative aspects of performance dancing.

During that hearing, Dr. Hanna testified that a vast number of mainstream dance and dramatic performances contain the sorts of expression that would both implicate the Act, and be prohibited in venues to which it applied.

She testified that unlimited numbers of performances outside the realm of traditional adult entertainment involve nudity, or have as a principal part or as their emphasis simulated sexual contact and touch between performers.[14] These included dramatic works, musical theater, ballets, opera, modern dance performances of a sort frequently performed in mainstream venues and on college campuses.[15]

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[14]*See Transcript of Proceedings* of April 11, 2008, at pp. 47-48.

[15]Her examples included dramatic works such as *Street Car Named Desire*, *Orpheus Descending* and *Naked King*, and ballets and modern dance performances such as the *Prodigal Son*, *Bugaku*, as choreographed by George Balanchine, *Mutations*, which had then recently been performed at the Brooklyn Academy of Music, and an untitled work by the Pilobolus dance troupe featuring nude dancers arm-in-arm. She noted that nudity and erotic themes figure prominently in musical theatre, such as the oft-cited *O! Calcutta*, and more contemporary works like *The Full Monty* and, and in operas such as *Salome*. *Id.*, at 47-47.

But even more remarkable is the prohibition which requires entertainers in **any** venue subject to the Act to stay at least six feet from not only customers, but also from one another during their performances. It bears emphasis that, by its plain terms, this restriction applies not only to erotic performances or even the erotic portions of mainstream performances, but also to **every** performance presented in any venue to which the Act is deemed to apply.[16]

Dr. Hanna testified that, under these strictures, no mainstream dramatic or dance performance (except, we are prepared to allow, one man shows) could be presented in any theater which officials regarded as being subject to the Act.[17]

Here it is well to recall that the Act applies to places "**a** principal use of which" is the presentation of covered performances.

As Dr. Hanna testified, many artistic performances, whether on tour or otherwise, engage a given venue for substantial runs, the length of which would on its own make their presentation a principal use of the venue in which they were presented, and thus make the venue subject to the Act.[18]

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[16]Again, Section 1114(c) reads, in pertinent part: "all performances shall only occur upon a stage . . . and removed at least six feet (6') from the nearest entertainer, employee, or customer."

[17]*See Transcript of Proceedings*, April 11, 2008, at pp. 55-56.

[18]*Id.* at 53-54.

Dr. Hanna also testified that self touch, and a ban on touching other performers would sharply curtail the ability of both mainstream and traditionally adult dancers to present an artistic message of eroticism which is an important aspect of both genres.[19]

The Defendants put on no evidence to contradict the testimony of Dr. Hanna.

Nor did they controvert the declarations submitted by the principals who operate the Plaintiff establishments. Both Steve Cooper and Gerald Westlund have extensive experience operating both adult and other nightclubs. Both men testified that the prohibitions which the Act imposes on erotic performances, and the ban on the consumption of even beer in adult establishments, would financially devastate their businesses.[20]

As a result, both declarants testified, they would choose to cease presenting adult entertainment, as it is defined by the Act, rather than attempt to do business subject to its strictures.[21]

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[19]*Id.*

[20]The Declarations of Steven Cooper and Gerald Westlund were submitted to the District Court as exhibits to the Memorandum of Law Supporting the Preliminary Injunction Motion filed by the Plaintiffs. (Docket No. 21-1 in United States District Court Case No. 2:08-CV-2047 (W.D.Tenn.). *See* Cooper Decl., Docket No. 21-2, at ¶¶ 10-14, Westlund Decl., Docket No. 21-3, at ¶¶ 9-13.

[21]See Cooper Decl., Docket No. 21-2, at ¶¶ 14-15; Westlund Decl., ¶¶ 15-16.

Because the Plaintiffs, between them, operate a substantial fraction of the adult nightclubs in Memphis, this would have a devastating effect on the quantity and availability of adult speech in that city.[22]

On April 23, 2008, the district court denied the Plaintiff's preliminary injunction motion, finding their success on the merits to be unlikely, and holding, inter alia that the "principle use" and the "principal or predominate theme" language in Sections 1102(2) and (3) respectively avoided unconstitutional overbreadth. App. 66, 77.

The district court also rejected claims that the Act would reduce the quantity and availability of adult expression in Memphis as merely "economic arguments," finding that the law required only that the Plaintiffs be given an economically reasonable opportunity to operate their businesses, something which trial court found the Act provided. App. 54-58, 75-76.[23]

The Sixth Circuit Appeal

The Plaintiffs timely appealed the denial of the preliminary injunction motion to the Sixth Circuit, a panel of which on November 25, 2009 affirmed that decision. App. 1, 42. A timely filed motion for rehearing and rehearing en banc was denied on March 2, 2010. App. 78.

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[22]See App. 4 (substantial fraction of nightclubs).

[23]Notwithstanding its denial of the preliminary injunction motion, on April 29, 2009, the district court enjoined the enforcement of the Shelby County ordinance pending the resolution of that appeal.

The panel acknowledged that the Sixth Circuit and several sister courts have held that laws ostensibly aimed at curtailing the adverse secondary effects of adult expression may not restrict performances in venues with no demonstrable link to such adverse secondary effects, lest they be stricken as overbroad. App. 6-10.[24]

But the panel concluded that the Act was not such a law, because the language contained in its pivotal definitions could be narrowly construed to cabin its application solely to adult venues. App. 11-29.

We will deal with the tortured and logically insupportable linguistic analysis upon which the panel relied to reach that conclusion below.

The panel also concluded that the Act was not overbroad as to the limits it imposed on dance performances, both because it did not reach mainstream venues and because the ban on nudity and self touch within adult establishments was not unrelated to the suppression of adverse secondary effects. App. 29-40.

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[24]App. 6-7, 9-10 (citing: *Hamilton Bogarts, Inc. v. Michigan*, 501 F.3d 644, 654 (6th Cir. 2007); *Executive Arts Studios, Inc. v. City of Grand Rapids*, 391 F.3d 783, 798-99 (6th Cir. 2004); *729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 504 (6th Cir. 2008); *Odle v. Decatur County* , 371 F.3d 386, 395, 399 (6th Cir. 2005); *Triplett Grille v. City of Akron*, 40 F.3d 129 (1994)), and App. 10 (citing, *e.g.*; *Conchatta v. Miller*, 458 F.3d 258, 266 (3d Cir. 2006); *Giovanni Carandola v. Bason*, 303 F.3d 507, 510, 516 (4th Cir. 2002), *Ways v. City of Lincoln*, 274 F.3d 514, 519 (8th Cir. 2001)).

The panel rejected the claim that the Act was vague, based in large part upon its construction of it myriad provisions. App. 40-42.

Finally, the panel rejected without any analysis whatever the contention that the Act would impermissibly reduce the quantity and availability of adult speech in Memphis, stating only that it was "unpersuaded" (apparently despite the uncontroverted record evidence to the contrary) that the Act would make the presentation of adult entertainment in Memphis "so onerous" as to cause nightclubs to abandon it entirely. App. 42.

As we shall see, each of these conclusions builds upon an interpretation of the Act that simply cannot be reconciled with a faithful reading of its text, and oversteps the limits beyond which a federal court may not stray in construing a statute the plain text of which is overbroad, limits that were explained again this term in *United States v. Stevens*, ___ S.Ct. ___, 78 U.S.L.W. 4345 (U.S., April 28, 2010), and which the Sixth Circuit exceeded here.

REASONS FOR GRANTING THE WRIT

The manner in which the Sixth Circuit construed the Act is entitled to no special deference.

For one thing this is not a case, such as *Virginia v. American Booksellers, Inc.*, 484 U.S. 383, 395 (1988) or *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985) in which two lower federal courts agreed upon the construction of a statute.

As their respective opinions demonstrate, the Court of Appeals, App. 7-40, and the District Court, App. 59-66, approached the question of overbreadth in different ways, and the Sixth Circuit employed an analysis that was both distinct from, and far more elaborate than that applied in the lower tribunal.[2]

More significant, however, is the fact that the analysis employed and construction by the Court of Appeals was not only unique to its opinion, but plainly wrong.

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[2] A telling example of this is the manner in which the District Court interpreted the phrase "a principal use" in Section 1102(2) of the Act, a phrase it simply misread by substituting the definite article "the" for the indefinite article "a" chosen by the Tennessee General Assembly. App. 62-64. The Court of Appeals, by contrast, treated the choice of the indefinite article at length. App. 13-15. The opinions diverge in many other ways. Nothing in the District Court opinion reflects the depth or extent of textual analysis employed by the Sixth Circuit Court of Appeals on this score. While we contend that analysis was erroneous, it was also distinct from that employed by the District Court, and thus does not deserve the deference given to a judicial interpretation of a state law upon which two lower federal courts have agreed.

As we shall demonstrate below, the construction of the statute upon which the Sixth Circuit grounded its decision was so at odds with the text in question as to be simply erroneous, and entitled to no deference at all. *Brockett*, 472 U.S. at 500 and n.9 (*quoting: Palmer v. Hoffman*, 318 U.S. 109, 118 (1943); *The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959)(lower court construction not deferred to when it is "clearly wrong"); *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960)(or when the construction is "clearly erroneous"); *Propper v. Clark*, 337 U.S. 472, 486-487 (1949)(or it is "unreasonable")).

That contention is supported by what we shall demonstrate next: that under its plain text, the Act applies to a wide variety of performances and venues with neither a demonstrated nor even a claimed connection adverse secondary effects.

I. An Important Question is Presented as to Whether a Statute, Which By Its Plain Language Restricts Constitutionally Protected Expression in a Variety of Mainstream Artistic Venues With Neither a Demonstrated Nor Claimed Connection to Adverse Secondary Effects, Is Unconstitutional Under the First Amendment Due to Overbreadth.

The plain text of the Act restricts expression in mainstream performances and venues in a manner which the Third, Fourth and Eighth Circuits have all held to be unconstitutional, but which this Court has yet to address.

The measure of overbreadth is a comparison between the plainly legitimate sweep of a statute and the collateral damage done to protected expression which is chilled by its application. *Watchtower Bible & Tract Soc. v. Village of Stratton*, 536 U.S. 160, 165 (2002). A regulation on speech will be declared unconstitutional on its face if its sweep is unnecessarily broad and if it threatens to ensnare either constitutionally protected activity or otherwise legitimate and innocent conduct. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

Here, according to its plain terms, the Act applies to myriad mainstream artistic presentations in traditional performance venues, something exhaustively established through the uncontroverted testimony of Dr. Hanna.

The paths by which mainstream venues may be swept up under the Act are legion.

Any place which, as a principal use of its business features entertainment in which a female breast is bared can be deemed an adult cabaret under the first sentence of Section 1102(2). A venue that "features entertainment of an erotic nature, including exotic dancers, strippers, male or female impersonators, or similar entertainers," whatever those terms mean, is also an adult cabaret under the second sentence of that Section.

Recall that an adult oriented establishment is also, under Section 1102(6), any place in which adult entertainment is presented for profit.

Given that adult entertainment embraces, under the plain terms of the Act, the range of dramatic and dance performances identified by Dr. Hanna, it takes only a little imagination to summon countless examples of how mainstream performances, and the mainstream venues in which they are more than occasionally presented, could fall subject to the Act, its requirements, and its prohibitions.

The Third Circuit invalidated restrictions of similar scope in *Conchatta, Inc. v. Miller,* 458 F.3d 258 (3d Cir. 2006), *cert denied,* 127 S.Ct. 1330 (2007), which found overbroad a Pennsylvania liquor statute and regulation that prohibited "lewd entertainment" in venues where alcohol was served.

Finding that the term lewd embraced performances that might be presented at "ordinary restaurants . . . dinner theaters, comedy clubs, and other venues" in which alcohol was served, the Court of Appeals found the restrictions before it unjustified by a reference to adverse secondary effects in "artistic, theatrical and non-adult entertainment venues." *Id.*, at 265, 268.

The court emphasized that its determination that the contested regulations were overbroad was grounded upon the finding that Pennsylvania courts had construed as "lewd entertainment" performances "involving fully exposed breasts, genital exposure, or genital touching." *Id.*, at 266.

> As noted above, however, the statutory definition has not been limited to include only entertainment with those characteristics, and this exacerbates the

> chilling effect on a wide range of First Amendment protected expression when the Challenged Provisions are applied to artistic, theatrical, and other non-adult entertainment venues.

Id., at 266.

In *Giovani Carandola v. Bason*, 303 F3d 507 (4th Cir. 2002), the Fourth Circuit sustained an overbreadth challenge to a North Carolina liquor law, N.C. Gen. Stat. § 18-1005(a), and to an administrative rule enacted under the aegis of that statute, which prohibited, in relevant part: "Any conduct or entertainment by any person whose private parts are exposed or who is wearing transparent clothing that reveals the private parts . . . ."

Giovani Carandola, 303 F.3d at 510 (quoting N.C. Gen. Stat. § 18-1005(a)(4)-(6)). It held:

> The restrictions challenged here, however, sweep far beyond bars and nude dancing establishments. They reach a great deal of expression "in the heartland of [the First Amendment's] protection."
>
> * * *
>
> The Commission has . . . conceded that the restrictions have the same prohibitory effect on much non-erotic dance – such as a ballet in which one dancer touches another's buttock during a lift – and all nudity or simulated nudity,

> however brief, in productions with clear artistic merit -- such as the Pulitzer Prize winning play, Wit. Furthermore, evidence before the district court indicated that the restrictions also apply to much other mainstream entertainment, *including popular and* award-winning musicals such as Cabaret, Chicago, Contact, and The Full Monty and most kinds of jazz and flamenco dance.

Id., at 516 (citation omitted).[26]

Likewise, in *Ways v. City of Lincoln*, 274 F.3d 514 (8th Cir. 2001), the Eighth Circuit invalidated as fatally overbroad a municipal ordinance that prohibited any performer from the "intentional[] touching of a person's sexual organ, buttocks or breasts, whether covered or not, or kissing when such contact could be construed as being for the purpose of sexual arousal or gratification of either party or any observer." *Id.*, at 516.

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[26]We note in passing that both the Third Circuit in *Conchatta*, 458 F.3d at 268 (citing *City of Akron v. Triplett Grill*, 40 F.3d 129, 136 (6th Cir. 1994) and *Odle v. Decatur County, Tennessee*, 421 F.3d 386, 397 (6th Cir. 2005)) and the Fourth Circuit in *Giovanni Carandola*, 303 F.3d at 518 (citing *Triplett Grill*, 40 F.3d at 136) supported their decisions by reference to Sixth Circuit cases which the panel in this case found inapplicable. App. 10-11.

Like the Third and the Fourth Circuit after it, the Eighth Circuit found the contested law overbroad because it was not, by its terms, confined to adult entertainment.

Rather, the ordinance reached "theater performances, ballet performances, and many other kinds of live entertainment" and could be enforced to prohibit "stage actors from kissing and ballet dancers or ice skaters from lifting each by the buttocks, if such acts could 'reasonably be construed' to be for the 'sexual arousal or gratification' of any observer or performer." *Id.*, at 518-19.

The plain and expansive language of the Act makes it of a piece with the laws invalidated in these cases, and puts the decision at issue in direct conflict with the holdings of three of the circuit courts of appeal.

The Sixth Circuit panel paid passing homage to both *Odle* and *Triplett Grill,* App. 9-10 – opinions upon which the Third and Fourth Circuits relied in the cases just described – but it expressed "serious doubt" as to whether the operators of mainstream venues would "scrutinize the provisions of a regulatory scheme aimed at *adult-oriented* businesses" and find in them a chill sufficient to limit their own expression. App. 27.

This is an odd basis upon which to find that a regulation of expression, adopted as a public law and backed up by the threat of criminal prosecution, will not have a chilling effect.

Indeed, it amounts to little more than the claim that the Act is too obscure to chill mainstream presentations, and that for the operators of such venues its obscurity, and their ignorance, is bliss.

What is more, this Court recently and unambiguously rejected the contention that either the supposed obscurity of a prohibition on protected expression, or the improbability of its application by the government, in any way redeems a law which, by its plain terms is facially overbroad.

In *United States v. Stevens*, 130 S.Ct. 1577 (2010), this Court invalidated a federal statute criminalizing depictions of animal cruelty as facially overbroad. *Id.*, at 1592.

One provision of the statute at issue in *Stevens*, 18 U.S.C. § 48 (c)(1), made criminal liability under the Act contingent upon the depiction of conduct involving animals which itself was unlawful under federal, state or local law.

Writing for the Court, Chief Justice Roberts observed that this exposed defendants to "a bewildering maze of regulations from at least 56 separate jurisdictions," including state-law bans on hunting with a crossbow in Georgia, the hunting of captive ungulates in Missouri, and the taking of a sharp-tailed grouse in Idaho. *Id.* at 1589. (citing GA. CODE ANN. § 27-3-4 (1); MO. CODE REGS. ANN., TIT 3, 10-9.560 (1); IDAHO ADMIN. CODE § 232-28-242 (2009).

What is telling about this analysis is that it emphasizes the very obscurity of the state laws the violation of which were predicate offenses under Section 48 (c)(1). The fact that those laws were numerous, obscure and from far-flung jurisdictions did not redeem the statute, but rather contributed to its overbreadth.

Equally unavailing – after *Stevens* – is the willingness of the panel to turn a blind eye to the plain text of the Act, while crediting the Defendants disavowal of any intent to read it as broadly as its text would allow. App. 24.

The United States took a similar position in *Stevens*, assuring the Court that it would enforce Section 48 only in cases involving depictions of "'extreme'" animal cruelty. *Id.*, at 1591. The Court rejected out-of-hand the notion that those representations somehow redeemed a law, the plain text of which was overbroad.

> Not to worry, the Government says: The Executive Branch construes § 48 to reach only "extreme" cruelty . . . and it "neither has brought nor will bring a prosecution for anything less.
>
> * * *
>
> But the First Amendment protects against the government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.

Stevens, 130 S.Ct. at 1591 (citation to briefs omitted).

The Act contains no express language exempting mainstream establishments from such enforcement, and the representations of the Defendants in this light should be insufficient to redeem an otherwise overbroad Act.

The far-reaching contours of the Act, outlined above, also provide the Court with an opportunity to address what has, for two decades, been a significant and unsettled question in First Amendment law.

The Court has twice considered the First Amendment implications of regulations which restrict the presentation of nude dancing. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

Both decisions affirmed the premise that nude dancing is entitled to some protection under the First Amendment. Each decision, however, was decided by a fractured Court, with multiple opinions, none of which commanded a majority of five justices.

The lead opinion in *Barnes* was written by Chief Justice Rehnquist and joined by Justices O'Connor and Kennedy. Justices Scalia and Souter each wrote separate concurrence, while Justice White, joined by Justices Marshall, Blackmun and Stevens dissented.[24]

Similarly, in *City of Erie*, Justice O'Connor wrote the lead opinion evaluating the constitutionality of the Erie, Pennsylvania ordinance regulating nude dancing.

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[24]Under *Marks v. United States*, 430 U.S. 188, 193 (1977), Justice Souter's concurrence – as the opinion of a fragmented court stating the narrowest grounds supporting the judgment – is the controlling opinion of the Court.

Chief Justice Rehnquist and Justices Breyer and Kennedy joined in that opinion. Justice Scalia concurred, joined by Justice Thomas. Justice Souter concurred in part and dissented in part, and Justice Stevens dissented, joined by Justice Ginsburg.

In neither case, however, was this Court presented with the opportunity to assess a prohibition on nude dancing in the context of an overbreadth challenge.

In *Barnes*, the Court noted: "Because there is no overbreadth challenge before us, we are not called upon to decide whether the application of the statute would be valid in other contexts." *Barnes*, 501 U.S. at 585, n.2.

In *City of Erie*, 529 U.S. at 286, the Court emphasized: "Because the [lower] court determined that the public nudity provisions of the ordinance violated Pap's right to freedom of expression under the United States Constitution, it did not address the constitutionality of the ordinance under the Pennsylvania Constitution or the claim that the ordinance is unconstitutionally overbroad."

This case, therefore, will present the Court with the opportunity to reach an issue which has heretofore eluded it. This is precisely the sort of "important question of federal law that has not been, but should be settled by this Court" described in Supreme Court Rule 10(c).

The precedent addressing the constitutionality of regulations imposing restrictions on live entertainment arises from a miasma of opinion, on which a majority of the Court could not agree.

Consequently, lower courts have been left to struggle to analyze the constitutional issues raised by regulations of adult entertainment without clear and precise guidance of this Court. This need for clarity is well reflected in the federal appellate jurisprudence that has emerged after these two decisions.

> Twice . . . the United States Supreme Court has considered the constitutionality of ordinances banning commercial nude dancing under the Free Speech Clause, and both times the Court produced fractured decisions with no majority opinion and no clear statement of controlling doctrine.
>
> * * *
>
> This . . . it is far from clear how prohibitions of nude dancing "fit" within the conceptual structure of First Amendment law

Heideman v. South Salk Lake City, 348 1182, 1184-85 (10th. Cir. 2003)(citing *City of Erie* and *Barnes*). *See also, e.g.: Fantasy Ranch v. City of Arlington, Texas*, 459 F.3d 546, 555 (5th Cir. 2006)(noting the absence, from those cases, of guidance as to prohibitions on nudity aimed solely at expressive activity); *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1307-08 (11th Cir. 2003)(parsing the applicability of *City of Erie* and *Barnes* as distinct doctrines, and comparing *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986)); *S.O.B., Inc. v. City of Benton*, 317 F.3d 856, 858 (8th Cir. 2003)(finding the issue of nude dancing "surprisingly complex because it lies at the intersection of two related but distinct lines of Supreme Court First Amendment decisions," including *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002)).

Whether a facial ban on nude and even erotic dancing can survive an overbreadth challenge is a question this Court should take and resolve.

II. The Sixth Circuit Saved the Act Through a Narrowing Construction That Radically Departed from the Plain Meaning of Its Text, and to Which It Was Not Readily Susceptible, Thereby Exceeding Its Power and Raising an Important Question as to the Limits on a Federal Court Narrowly Construing State Law.

Principles of federalism tightly circumscribe the degree to which a federal court may narrowly construe a state statute to avoid finding it unconstitutional.

> It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld. The key to application of this principle is that the statute must be "readily susceptible" to the limitation; we will not rewrite a state law to conform it to constitutional requirements.

Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 397 (1988)(citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)).

This Court has variously characterized the sorts of circumstances in which such narrowing constructions may be employed. *Stevens*, 130 S.Ct. at 1591-92. A law must, be "by its plain terms . . . easily susceptible of a narrowing construction" before a federal court may read it narrowly to avoid the problem of overbreadth. *Erznoznik*, 422 U.S. at 216.

A finding of overbreadth is appropriate unless a saving construction is "readily apparent" in the statute itself. *Gooding v. Wilson*, 405 U.S. 518, 521 (1972)(quoting *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965)), and may be avoided only when the "text or other source of [legislative] intent identifi[es] a clear line" between the lawful and illegitimate applications of an act. *Reno*, 521 U.S. at 884.

The Sixth Circuit, of course, is cognizant of these limitations, and its duty to abide by them in cases involving state adult use laws as well. *Odle*, 421 F.3d at 396; *Triplett Grill*, 40 F.3d at 136. But after paying nominal deference to the limits on its interpretive power, App. 25, the panel preceded to construe the Act with abandon, in ways at marked odds with its text.

The panel dealt with the three principal definitions at issue individually, and in each case imposed a narrowing construction based upon a reading of the text that was at odds with its plain meaning. We shall address those examples presently.

Before we do, however, it is important to stress that the panel did more than merely construe the individual definitions in a manner at odds with their text.

Taken as a whole, the analysis employed by the panel ignored the legislative intent inherent in the very structure of the Act, which begins with a lengthy set of broad-reaching definitions that were plainly intended to reach a number of distinct realms within which expression might be presented, and to define each of those realms broadly. Conflating and conjoining definitions ignores that structure.

Moreover, the approach taken by the panel ignores the fact that the definitions listed in Section 1102 of the Act represent a list of distinct, alternative paths by which a given presentation at a given venue might become subject to the Act, which are listed disjunctively, as befits alternatives paths to inclusion under the Act.

By creating conjunctive links between and among the definitions where none exist in the text, the panel converted a collection of disparate paths into a series of conjunctive requirements to be met before the Act applies.

The panel began with the definition of "adult cabaret," which the Act defines separately, and which thus provides a distinct way of being subject to the Act.[28]

The panel rejected the claim that the use of the indefinite article in "a principal use" allowed venues which have long runs of adult fare to be subject to the Act in a way that would not be true had the drafters of the Act chosen to apply this definition only to establishments "the" principal use of which was the presentation of adult fare. App. 13-14.

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[28]The text of the definition is quoted supra, at Note 2, and in the Appendix, at App. 83.

It next concluded that the second sentence of the definition – which refers to exotic dancers, strippers, male or female impersonators, or similar entertainers - was intended to illustrate the first, and not to augment its scope.

The panel reached this conclusion despite candidly admitting that it "**is probably true that some of the entertainers listed in the second sentence bear no relationship to the secondary effects the Act seeks to control.**" App. 15.

This observation is telling, because it represents the very circumstance which, ordinarily, demonstrates the existence of impermissible overbreadth.

The panel asserted that the second sentence of Section 1102(2) must be exemplary, and not complementary, because it can be "read naturally" to include the second set of performances only if they were presented in circumstances congruent with the first sentence: e.g., as a principal use of the business in which they are presented and involve exposure of the anatomical areas listed in the first sentence.

This, of course, does not provide logical support for the conclusion that the second sentence is illustrative, but simply assumes what it intends to prove.

The Act does not condition inclusion on the list set forth in the second sentence on the presentations listed there having certain, defining characteristics: it simply asserts that those presentations are sufficient to make an establishment an adult cabaret, period.

To treat the second sentence as illustrative – despite the fact that it contains examples which clearly do not illustrate the sorts of expression described in the sentence before it – is simply to rewrite the Act, and in the process to render the second sentence surplusage.

Such an interpretation violates the general rule that statutes should be interpreted to give effect to all their words and clauses, and not to treat some as surplusage. *T.R.W., Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Duncan v. Walker*, 533 U.S. 167, 177 (2001).

The panel next turned its attention to the definition of "adult-oriented establishment," which it proceeded to narrow in a fashion it recognized was at odds with the manner in which the definition itself was crafted.

The fighting issue here was whether the word "or" in the fifth line of the definition as quoted in the Appendix, App. 84, served to introduce a new, and independent clause (beginning with "or wherein an entertainer provides adult entertainment"), which we contend is plain on the face of the Act, or whether it serves merely to set off the viewing of adult motions pictures from other adult entertainment, within the confines of a facility already divided into booths or cubicles.

The panel embraced the latter construction, notwithstanding its admission that it is the less grammatical reading of the Act, as being one of two "plausible" constructions. App. 25.

In doing so, it read the Act to apply only to those presentations of "adult entertainment" (a defined term in its own right, treated below) which occurred in such physically subdivided spaces. (Id.)[29]

This, it characterized as being nothing but a permissible relaxation of the standards of English grammar, intended to give effect to the intent of the legislature. App.26. But of course, and obviously, it was more.

Nothing else in the Act, and nothing identified by the panel, supports the contention that the legislature intended the presentation of "adult entertainment" to confer "adult establishment" status only when presented in subdivided venues.

In holding otherwise, the panel chose to forsake the text of the Act, and to decide an isolated, if pivotal point in spite of its natural grammatical meaning, in order to bend the entire Act to a narrow view at odds with its construction overall.

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[29]Cognizant that not even this interpretive leap would save the Act from overbreadth, the panel went further. Notwithstanding the fact that Section 1102(6), under the panel's own logic, applies **only** to performances in "booths, cubicles, **rooms**, compartments or stalls separate from the common areas" the panel construed the Act to read "rooms" as meaning "booths" and similar small spaces, for the paradoxical reason that the legislature chose to list both rooms and booths in Section 1102(6), which the panel took to signal its intent **not** to apply the Act to premises subdivided into rooms. App. 28-29 and n.15. It is difficult to characterize reading "rooms" to mean "booths," in this light, as something other than simply rewriting of the Act. (Emphasis added to "rooms" in the first quoted passage above).

This is nowhere better illustrated than in the acknowledgment, by the panel, that even this act of linguistic surgery was not enough to redeem the Act from overbreadth because it did nothing to cabin the meaning of "adult entertainment" under the Act.[30]

> We recognize that this does not automatically address the second problem with the definition of "adult entertainment" – the apparent self-sufficiency of a predominant emphasis on "pantomime," "modeling," or "any other personal service offered to customers" to transform a performance or exhibition into "adult entertainment."

App. 27. The panel "solved" this "problem" by simply including within the definition of "adult entertainment" conditions which are absent from its text.

The panel concluded that the stand-alone definition of "adult entertainment"set forth in Section 1102(3) should be read "in conjunction with" its highly interpreted reading of the stand-alone definition of "adult-oriented establishment."

> If we read "Adult entertainment" in conjunction with the narrowly construed definition of "adult oriented establishment," the hypothesized unconstitutional applications dwindle in number, if not disappear.

App. 27.

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[30]That definition is set forth at Note 4, supra, and in the Appendix, at App. 83.

The problem with this is that nothing in the text of Section 1102 suggests that these definitions – which the legislature crafted separately and at length – are meant to be conflated. Indeed, the only reason to rewrite Section 1102(2) as if it contained the limitations of Section 1102(6) is to save the Act from being found overbroad.

Of course, there is a profoundly compelling reason not to adopt such a reading, in addition to the fact that it simply contravenes the language chosen by the General Assembly. Section 1102(6), as written, defines "adult oriented establishment" as a place in which "adult entertainment" is presented.

After the radical surgery performed by the panel, however, Section 1102(2), the definition of "adult entertainment," must now be read as including only performances that occur in spaces subdivided to comport with the panel's notion of an "adult oriented establishment."

The result, through which the panel purports to have saved the Act, is to render both definitions tautological.

What is an "adult oriented establishment?" Under the interpretation wrought by the Sixth Circuit, it is now a place where adult entertainment occurs.

What is "adult entertainment?" Under the Act, as read by the panel, it is something presented in adult-oriented establishments.

The panel, in sum, did violence to the language of the Act on several levels;

- by substituting its own meaning for words and phrases precisely defined in the Act;

- by construing into silence terms ("rooms") which undermined its own interpretation; endorsing an ungrammatical over a prosaic reading of the Act;

- by ignoring the disjunctive and wide ranging nature of the definitions found in Section 1102, and;

- by reading those definitions to impose burdens elsewhere in the Act.

These broad and repeated departures from the text of the Act cannot be reconciled with the limits on statutory construction by which this Court considered itself to be bound in *Stevens*.[11]

The Court, for example, declined to read Section 48 as applicable only to cases in which depictions of animal cruelty were accompanied by actual acts of animal cruelty, because the plain and unambiguous text of the statute did not require such a construction in order to be intelligible. *Stevens*, 130 S.Ct. at 1588.

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[11]This observation is more salient because *Stevens*, unlike the case at bar, involved the construction of a federal statute. While the interpretive powers of a federal court are always circumscribed by necessary deference to the legislature, *See Salazar v. Buono*, ___ S.Ct. ___, ___, 78 U.S.L.W. 4345 (U.S., April 28, 2010), those powers reach their nadir when construing state statutes, a task which implicates federalism as well. *See Stevens*, 130 S.Ct. at 1587-88.

By contrast, and as outlined above, the Sixth Circuit panel was only too willing to read limitations into the Act that modified terms that were plain on their face.

The Court, also rejected as "unrealistically broad" a proffered reading of Section 48 (b), which exempted various "meritorious" depictions of animal cruelty from prosecution, choosing instead to hew to the plain language of the text and rejecting, for example, a reading of "serious" that would have narrowed the reach of contested statute considerable.

It did so in deference to the text, because "the text says 'serious' value, and 'serious' should be taken seriously." *Stevens*, 130 S.Ct. at 1590 (quoting 18 U.S.C. § 48 (b)).

Such fidelity to the text of a statute is a far cry from the liberties taken by the panel below, which not only conflated distinct definitions to suit its interpretive needs, but ignored unambiguous words of its choosing (such as "rooms," for example) to bend the meaning of the Act to the construction it endorsed.

This was a dramatic departure from the plain meaning of a state statute, and raises an important question as to the latitude an Article III court may exercise in attempting to narrowly construe a state law.

III. This Case Affords the Court an Opportunity to Define and Clarify the Requirements Announced in Justice Kennedy's Concurrence in *City of Los Angeles v. Alameda Books,* 525 U.S. 425 (2002) that Restrictions on Adult Expression Justified by Reference to the Reduction of Adverse Secondary Effects Must Materially Reduce Such Effects Without Substantially Reducing the Quantity or Availability of Adult Expression in the Relevant Jurisdiction.

At least two Circuit Courts of Appeals, including the Sixth Circuit, have recognized that the concurring opinion of Justice Kennedy in *Alameda* requires that regulations which seek to limit the adverse secondary effects of adult uses must do so without substantially limiting the quantity and availability of adult expression within their jurisdiction. *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009); *729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485 (6th Cir. 2008).

But while the necessity of satisfying the "proportionality requirement" has, in the eight years since *Alameda Books* was decided, become an increasingly accepted part of adult use jurisprudence, the manner in which adherence to that requirement should be assessed has not been settled. *Compare, e.g.: Center For Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1162 (9th Cir. 2003)(majority, holding proportionality requirement did not prohibit limits on an adult use's hours of operation) *with Id.*, at 1172 (Canby, J., dissenting, finding that such a reduction necessarily imposed an impermissible reduction in the availability of adult speech).

The principals of the seven Plaintiffs have extensive experience in the operation of adult entertainment venues. The Plaintiffs all have beer licenses, and lawfully permit customers to bring in their own liquor to consume on site. They regularly present entertainment in which more than one dancer appears on stage at the same time and within six feet of one another.[32]

Those entertainers touch one another during performances in appropriate and non-sexual ways. In addition to stage dancing, the Appellants offer dances for individual customers during which entertainers perform in close proximity to the patrons.

All of the foregoing is banned by the plain text of the Act, even when the entertainers are fully clothed.

Faced with these restrictions, the principals of the Plaintiffs testified – by way of declarations in the district court – that they have determined that their businesses cannot and will not survive under the Act. They further testified that, should the Act become enforceable, they will cease presenting adult entertainment, within the meaning of the Act, in order to save their businesses.[33]

Their testimony in this regard was never contradicted in the district court.

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[32] *See* Cooper Decl., Docket No. 21-2, at ¶¶ 8-10; Westlund Decl., ¶¶ 6-9.

[33] *See* Cooper Decl., Docket No. 21-2, at ¶¶ 14-16; Westlund Decl., ¶¶ 12-15.

The uncontroverted record evidence, then, is that the enforcement of the Act will substantially reduce the quantity and the availability of protected erotic expression in Memphis.

The proportionality rule is emerging in the federal appellate courts as a central requirement of *Alameda Books*, and yet is a doctrine which this Court has yet to refine and clarify. This case provides a needed and important opportunity for the Court to do so.

CONCLUSION

For these reasons, Petitioners respectfully request that the Court accept this case for review.

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File Name: 09a0406p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ENTERTAINMENT PRODUCTIONS, INC., et al.,	)	
Plaintiffs-Appellants,	)	No. 08-5494
v.	)	
SHELBY COUNTY, TENN., et al.,	)	
Defendants-Appellees,	)	
ROBERT E. COOPER, JR., Attorney General,	)	
Intervenor-Defendant-Appellee.	)	

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 08-02047—Bernice B. Donald, District Judge.

Argued: April 20, 2009

Decided and Filed: November 25, 2009

Before: BOGGS, MOORE, and SUTTON, Circuit Judges.

COUNSEL

ARGUED: J. Michael Murray, BERKMAN, GORDON, MURRAY & DeVAN, Cleveland, Ohio, for Appellants. Robert B. Rolwing, ASSISTANT COUNTY ATTORNEY, SHELBY COUNTY GOVERNMENT, Memphis, Tennessee, Steven A. Hart, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellees. ON BRIEF: J. Michael Murray, Raymond V. Vasvari, Jr., BERKMAN, GORDON, MURRAY & DeVAN, Cleveland, Ohio, for Appellants. Robert B. Rolwing, ASSISTANT COUNTY ATTORNEY, SHELBY COUNTY GOVERNMENT, Memphis, Tennessee, Steven A. Hart, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, Thomas Roane Waring III, CITY ATTORNEY'S OFFICE, Memphis, Tennessee, for Appellees.

BOGGS, J., delivered the opinion of the court, in which SUTTON, J., joined. MOORE, J. (p. 32), delivered a separate opinion concurring only in the judgment.

OPINION

BOGGS, Circuit Judge. Plaintiffs-Appellants Entertainment Productions, Inc., et al. filed suit to challenge the constitutionality of the Tennessee Adult-Oriented Establishment Registration Act ("Act" or "Tennessee Act") on First Amendment grounds. Plaintiffs appeal from a district court's denial of a preliminary injunction against the enforcement of the Tennessee Act in Shelby County. Plaintiffs claim that the Tennessee Act is unconstitutional on four grounds. First, Plaintiffs contend that the definitions of "adult cabaret," "adult-oriented establishment," and "adult entertainment" render

the Act unconstitutionally overbroad, and second, that these definitions are vague. Third, Plaintiffs argue that prohibitions on certain kind of physical contact on the premises of an adult-oriented establishment are overbroad. Fourth, Plaintiffs claim that the Tennessee Act will substantially diminish the availability of adult speech in Memphis, Shelby County. Plaintiffs conclude that the district court erred in determining both that Plaintiffs did not demonstrate a substantial likelihood of success on the merits of their claims and that the balancing of equities disfavored a preliminary injunction. We affirm the district court's denial of the preliminary injunction.

I

This case presents a constitutional challenge to the Tennessee Adult-Oriented Establishment Registration Act of 1998, Tenn. Code Ann. § 7-51-1101 *et seq.* The Tennessee Act is a county-option state law, enacted to address the recognized negative secondary effects associated with "adult" or sexually oriented businesses, including crime, spread of sexually transmitted diseases, lowering of property values, and other related public welfare and safety issues. The Act sets up a licensing scheme for sexually oriented businesses, prohibits certain activities on the premises of such businesses, and regulates the manner in which entertainment may be presented therein. The Act enters into effect in a particular county after "a two thirds (2/3) vote of the county legislative body adopting this part." Tenn. Code Ann. § 7-51-1120. On September 13, 2007, Shelby County's Ordinance 344 ("Ordinance") adopted the Tennessee Act in Shelby County. The Ordinance relied on Tennessee's legislative findings of "deleterious secondary effects commonly associated with adult-oriented establishments, including but not limited to an increase in crime, the

spread of sexually-transmitted diseases, the downgrading of property values, and other public health, safety, and welfare issues." Pursuant to the Ordinance, the Act entered into effect in Shelby County on January 1, 2008, but provided a 120-day "grace period" to allow businesses and employees to obtain licenses required by the Act.

The Act regulates all establishments that conform to a statutory definition of "adult-oriented establishment" in two general ways. First, all businesses subject to the Act, as well as their employees and entertainers, must obtain a license or a permit. Second, the Act regulates the manner in which entertainment may be provided by adult-oriented establishments: it prohibits nudity, certain sexual activities, certain kinds of physical contact, and requires that all performances take place on a stage at least 18 inches above floor level and that all performers stay at least six feet away from customers, employees and other performers.

Plaintiffs operate a "substantial fraction" of the nightclubs in Memphis, Shelby County. On January 25, 2008 – prior to the expiration of the 120-day grace period for obtaining licenses – Plaintiffs filed suit in the United States District Court for the Western District of Tennessee against Shelby County and the City of Memphis, seeking injunctive relief and a declaratory judgment. Tennessee's Attorney General, Robert E. Cooper, Jr., was granted leave to intervene to defend the constitutionality of the Act (Shelby County, the City of Memphis, and the Attorney General are collectively referred to as "Defendants"). After a preliminary injunction hearing, the district court denied the requested injunction on the basis that Plaintiffs did not demonstrate a substantial likelihood of success on the

merits of their claims.[1] Plaintiffs now appeal from that decision.

II

A

A district court's denial of injunctive relief is normally reviewed for an abuse of discretion. *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007). The district court considers and balances four factors in making its decision: "(1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; (2) whether there is a threat of irreparable harm to the plaintiff; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief." *Ibid.* (quoting *City of Littleton v. Z. J. Gifts D-4, L.L.C.*, 541 U.S. 774, 784 (2004)). The first factor is crucial in First Amendment cases because public interest and harm to the parties largely depend on the constitutionality of the challenged law. The first factor presents a "purely legal question of whether the district court improperly applied governing law or used an erroneous legal standard," which we review *de novo*. *Ibid.* (internal quotation marks and citations omitted).

B

This court has repeatedly faced challenges to the constitutionality of state and local regulations of sexually or adult-oriented establishments. We recognize that such

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[1]However, the district court granted Plaintiffs' subsequent motion for an injunction pending this appeal.

regulations tend to abridge the opportunities for the communication and reception of "at least two protected categories of speech: first, sexually explicit but non-obscene speech, such as adult publications and adult videos, and second, 'symbolic speech' or 'expressive conduct,' such as nude [or nearly nude] dancing." *Richland Bookmart, Inc. v. Knox County, Tenn.*, 555 F.3d 512, 520 (6th Cir. 2009); *see also Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377, 396 (6th Cir. 2001). Notwithstanding the protection accorded to erotic expression by the First Amendment, the Supreme Court has held that governments may adopt measures intended to ameliorate the adverse secondary effects of such expression, so long as the restrictions placed on expression survive intermediate scrutiny as set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), and *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986). Restrictions on sexually explicit expression are constitutionally permissible if: they further a substantial governmental interest "unrelated to the suppression of free expression," *O'Brien*, 391 U.S. at 377 – specifically, the amelioration of adverse secondary effects associated with adult establishments; they are narrowly tailored; and they "do not unreasonably limit alternative avenues of communication," *Renton*, 475 U.S. at 47. *See Richland Bookmart*, 555 F.3d at 520-22.

In accordance with *O'Brien*, *Renton*, and their progeny, we have declined to uphold particular regulatory measures, for which no substantial governmental interest unrelated to the suppression of speech was proffered, that burdened more speech than necessary in a manner unconnected to the interest in controlling secondary effects, and/or which unreasonably limited the avenues of communication for adult-oriented speech. *See, e.g.*, *Hamilton's Bogarts, Inc.*, 501 F.3d at 654; *Exec. Arts*

Studio, Inc. v. City of Grand Rapids, 391 F.3d 783, 798-99 (6th Cir. 2004); *see also 729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 504 (6th Cir. 2008).

In the present case, Plaintiffs do not argue that the application of the Tennessee Act to their establishments does not satisfy intermediate scrutiny under *O'Brien* and *Renton*.[2] Indeed, because the Act has not yet been enforced against Plaintiffs, they challenge key provisions of the Act as overly broad and/or vague, and maintain that nothing short of facial invalidation will remedy the chilling effect created by the threat of its unconstitutional applications.

In the context of the First Amendment, the chief evil of overly broad laws consists in the chilling effect they produce on protected expression. For this reason, the Supreme Court has relaxed the traditional rules of standing: plaintiffs are permitted "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 348 (6th Cir. 2007) (internal

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[2]Nor would such a claim be likely to meet with success, in light of the decision of the Tennessee Court of Appeals in *American Show Bar Series, Inc. v. Sullivan County*, 30 S.W.3d 324 (Tenn. Ct. App. 2000), *perm. app. denied*, 2000 Tenn. LEXIS 543 (Tenn. Mar. 15, 2000), which held that the Act was constitutional as applied to similarly situated plaintiffs. That court determined that the Act is a content-neutral time, place, and manner regulation of adult-oriented establishments, *id.* at 334, and that a number of challenged provisions survived intermediate scrutiny under *O'Brien*, including the provisions regarding prohibited activities, to which present Plaintiffs now bring a facial challenge on overbreadth grounds. *Id.* at 338-39.

quotation marks omitted) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). Thus, when a law "'prohibits a substantial amount of protected speech' both 'in an absolute sense' and 'relative to the statute's plainly legitimate sweep,'" the overbreadth doctrine dictates wholesale invalidation. *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 336 (6th Cir. 2009) (quoting *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008)). In the context of adult-oriented business regulations, "the overbreadth doctrine guards against the suppression of protected speech unconnected to the negative secondary effects cited as legislative justification." *Schultz v. City of Cumberland*, 228 F.3d 831, 849 (7th Cir. 2000) (citing *Tunick v. Safir*, 209 F.3d 67, 83 (2d Cir. 2000); *see also Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135 (6th Cir. 1994)).

Facial invalidation of a law is, as the Supreme Court and this court repeatedly noted, "strong medicine," as "'[s]ubstantial social costs' are incurred by preventing the 'application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct.'" *Richland Bookmart, Inc.*, 555 F.3d at 532 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). Therefore, the Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be substantial," *Williams*, 128 S. Ct. at 1838, and cautioned that invalidation for overbreadth be deployed sparingly and "only as a last resort," *Broadrick*, 413 U.S. at 613. Only if a plaintiff demonstrates "from the text of [the statute] and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally," is facial invalidation on overbreadth grounds appropriate. *Richland Bookmart, Inc.*, 555 F.3d at 532 (alteration in original) (quoting *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988)).

The void-for vagueness doctrine and the overbreadth doctrine vindicate overlapping values in First Amendment jurisprudence. In general, vague laws fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," risk "trapping the innocent," and create a danger of "arbitrary and discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). When a law implicates First Amendment freedoms, vagueness poses the same risk as overbreadth, as vague laws may chill citizens from exercising their protected rights. Accordingly, the Supreme Court has indicated that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech." *Smith v. California*, 361 U.S. 147, 151 (1959). "Although ordinarily '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,' we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech." *Williams*, 128 S. Ct. at 1845 (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–95 & nn.6 &7 (1982)).

This court has not shied away from invalidating a regulatory scheme in its entirety when the threat of impermissible applications and the consequent chilling effect unambiguously warranted this remedy. *See Odle v. Decatur County*, 371 F.3d 386, 395, 399 (6th Cir. 2005) (holding that a Decatur County ordinance, which prohibited, *inter alia*, nudity and the performance of arguably sexually suggestive acts in any place where liquor was sold, served or consumed, was overbroad because "it reache[d] a wide swath of public places likely to present performances not usually attended by harmful

secondary effects"); *Triplett Grille*, 40 F.3d at 136 (holding that the Akron public indecency ordinance was unconstitutionally overbroad because it prohibited nudity in all public places, without excepting "live performances with serious literary, artistic, or political value"). Our decisions are also in harmony with other circuits' disposition of similar challenges. *See, e.g.*, *Conchatta Inc. v. Miller*, 458 F.3d 258, 266 (3d Cir. 2006) (holding that a Pennsylvania regulation prohibiting "lewd" entertainment is unconstitutionally overbroad because it applied to all venues holding liquor licenses as well as those "operat[ing] in connection" with the licensed premises, sweeping in "a variety of performances that are entitled to the full protection of the First Amendment"); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 510, 516 (4th Cir. 2002) (holding that plaintiffs are likely to succeed in their overbreadth challenge to a North Carolina secondary-effects regulation because it applied to all establishments licensed to sell alcohol, "sweep[ing] far beyond bars and nude dancing establishments" and reaching "much other mainstream entertainment," with no evidence offered to connect the proscribed activities in mainstream venues to adverse secondary effects); *Ways v. City of Lincoln*, 274 F.3d 514, 519 (8th Cir. 2001) (holding that an ordinance is unconstitutionally overbroad because it reached beyond adult entertainment establishments to regulate conduct in "any business or commercial establishment," including "theater performances, ballet performances, and many other forms of live entertainment" not recognized to cause harmful secondary effects).

The facial attacks in *Odle*, *Triplett Grille*, *Conchatta*, *Carandola*, and *Ways* succeeded because the challenged statutes purported to regulate public venues that stage mainstream performances of artistic value, as well as venues that stage adult-oriented performances. In these

cases, the "strong medicine" of facial invalidation was warranted because casting so wide a regulatory net would certainly chill protected artistic expression that was not shown to produce the same adverse secondary effects associated with adult entertainment. Moreover, the challenged statutes were not "readily susceptible" either to a narrowing construction that would limit the regulatory scope to adult-oriented establishments or to a limitation by severance of problematic provisions. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). To demonstrate a substantial likelihood of success on the merits of the present claims, therefore, the Plaintiffs must establish that the allegedly unconstitutional provisions of the Tennessee Act result in a real and substantial number of impermissible applications that chill protected expression, that the statutory language is not readily susceptible to a limiting construction, and that any problematic provisions may not be severed because they are "an integral part of the [Act] viewed in its entirety," *Schultz*, 228 F.3d at 853.

C

In their first argument, Plaintiffs assert unconstitutional overbreadth on the basis of the three definitions that identify the set of establishments to which the Act applies. The licensing and other regulations contained in the Act apply to "adult-oriented establishments," which include "adult cabarets." Moreover, Plaintiffs claim that the category of "adult-oriented establishments" also includes *any* establishment that is open to the public and presents "adult entertainment" for profit. The three definitions – "adult-oriented establishment," "adult cabaret," and "adult entertainment" – render the Act overbroad, according to Plaintiffs, because they serve to prohibit and regulate

expression "not only within adult establishments, but also in a wide variety of venues with neither an actual nor an alleged link to the adverse secondary effects attributed to adult expression." Appellants' Br. at 13.

Our "first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 128 S. Ct. at 1838. We proceed, therefore, to construe each term challenged by Plaintiffs.

"Adult Cabaret"

An "adult cabaret" is an "adult-oriented establishment" subject to licensing and regulation under the Act, and is separately defined as follows:

> "Adult cabaret" means an establishment that features as a principal use of its business, entertainers, waiters, or bartenders who expose to public view of the patrons within such establishment, at any time, the bare female breast below a point immediately above the top of the areola, human genitals, pubic region, or buttocks, even if partially covered by opaque material or completely covered by translucent material, including swim suits, lingerie, or latex covering. "Adult cabaret" includes a commercial establishment that features entertainment of an erotic nature, including exotic dancers, strippers, male or female impersonators, or similar entertainers;

Tenn. Code Ann. § 7-51-1102(2). Plaintiffs identify three reasons why the set of establishments swept into the Act's

regulatory scheme by this definition results in overbreadth.

First, Plaintiffs argue that the statutory reference to "*a* principal use," rather than "*the* principal use," expands the Act's regulatory reach to multi-use and mainstream establishments. Appellants' Br. at 34. "Adult cabarets," on Plaintiffs' reading, include cabarets that have several uses, of which presentation of semi-nude entertainment is just one, as well as mainstream dramatic or artistic venues. The latter venues will fall within the definition of "adult cabaret," Plaintiffs insist, because "substantial runs of a drama, music or dance program . . . which contain nudity and thus can make the venue in which they are performed into an adult cabaret – go on for long periods, turning that performance into a substantial, and thus a principal use of the venue." Appellants' Br. at 35.

While article choice ought not be ignored in statutory interpretation, the chosen article is not the only or overriding signal of a statute's meaning. In this case, the common definition of the succeeding term ("principal") diminishes the significance of the indeterminate article. As the district court noted, "principal" means "*most* important, consequential, or influential." (quoting *Webster's Third New International Dictionary* 1802 (3d ed. 1993) (emphasis added)).[3] In light of this definition, the substantive import of the alleged distinction between "*the*

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[3]Unlike a number of other statutes we have encountered, the Tennessee Act does not define "principal use," which leaves its interpretation to the common definition of the term. *Cf. Richland Bookmart, Inc. v. Knox County, Tenn.*, 555 F.3d 512, 519 (6th Cir. 2009) (scrutinizing an ordinance that defined "principal business purpose" to mean, *inter alia*, 35% or more of displayed merchandise or its value, revenues, or interior business space).

most important" and "*a most* important" use of a business is negligible.

Even if this provision is read to include establishments with several "principal uses" of equal importance, we are not persuaded that entertainers' exposure of specified anatomical areas in the course of a performance would ever plausibly describe "a principal use" of theatrical, musical or similar mainstream artistic venues. A "run" of a performance, however long, that contains nudity, does not transform such a venue into an adult cabaret because no *specific* play, opera or ballet is commonly deemed to be "a principal use" of a venue.[4] With regard to establishments that are devoted to multiple uses of equal importance, one of which is admittedly adult entertainment, their inclusion under the Act's regulatory scheme would not violate the First Amendment. Neither this court nor the Supreme Court has required that regulatory efforts to address secondary effects of sexually oriented businesses must be confined to establishments that accord unequivocal priority to adult entertainment over all other business uses. The crucial inquiry in determining the permissible reach of such regulations is whether the government relied on evidence reasonably believed to be relevant in identifying the set of businesses that generate adverse secondary effects. Given the documented evidence of such effects examined by Tennessee, Shelby County, as well as other jurisdictions, it is not unreasonable to conclude that an establishment with more than one principal use – for instance, semi-nude dancing and food service – is as liable to produce negative externalities as an establishment wholly devoted to

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[4] It would be odd to say that a presentation of *Salomé*, rather than operatic performances generally, is a principal use of an opera house.

presenting semi-nude dancing."

Second, Plaintiffs argue that "the sorts of entertainment listed in the second sentence of § 7-51-1102(2) are intended to augment, and not exemplify, the first," which sweeps in mainstream establishments without requiring that "entertainment of an erotic nature" be their principal use. Appellants' Rep. Br. at 6-7, 35. We disagree. The second sentence merely lists examples of the kind of entertainment that may fit the definition set forth in the first sentence. Plaintiffs object that the list of entertainers in the second sentence "may or may not exemplify the first": "There is no requirement, rule or practice which says that a female impersonator will appear, for example, in lingerie or with bare breasts, or that a bared buttock[] is a necessary element of entertainment 'of an erotic nature'." Appellants' Rep. Br. at 7.

It is probably true that some performances by the entertainers listed in the second sentence bear no relation to the secondary effects the Act seeks to control. This, however, presents no difficulties of interpretation of the kind Plaintiffs evoke. Read naturally, a "commercial establishment that features entertainment of an erotic nature" by any of the listed performers is an "adult cabaret" under the Act *only* if entertainment by these

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"We have previously upheld various regulations applicable to similarly defined establishments, even if we did not confront an identical challenge to the definition. In *DLS, Inc. v. City of Chattanooga*, for instance, this court upheld a similar licensing and regulation scheme that applied to "establishment[s] which feature[] as a principle [sic] use of its business" entertainers or employees who expose the same anatomical areas specified in the provision at bar. 107 F.3d 403, 406 (6th Cir. 1997).

performers is a principal use of the business *and* if their attire exposes the anatomical areas specified in the first sentence. Read in this manner, the Act does not burden a substantial amount of protected expression unrelated to secondary effects.[6]

Third, Plaintiffs claim that the Act impermissibly regulates erotic dance performances by "clothed" dancers, which are unconnected to the adverse secondary effects the Act purports to address. *Id.* at 39. By "clothed," Plaintiffs mean entertainers who are distinctly not nude, but are clad in "bikinis, swimsuits, and other materials which, while opaque, do not completely cover the entire buttocks, or all portions of the breast below the topmost portion of the areola." *Id.* at 40. The theory that underlies this claim – that burdening performances put on by entertainers so attired constitutes an unconstitutional application of a secondary-effects regulation – was addressed and rejected by this court in *Richland Bookmart*, 555 F.3d at 529-30.

In that case, we explained that in view of the evidence of secondary effects relied on by Knox County, as well as numerous other local and state governments promulgating similar regulations, "'it was reasonable for the City to conclude that establishments featuring performers in attire more revealing than bikini tops pose the same types of problems associated with other [sexually oriented businesses].'" 555 F.3d at 529 (quoting *Baby Dolls Topless*

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[6]Because we find that the second sentence does not augment the complete definition of "adult cabaret" contained in the first sentence, we find it unnecessary to address Plaintiffs' further arguments about the inadequacy of the word "feature" as an alternative source of a limiting construction. See Appellants' Rep. Br. at 8.

Saloons, Inc. v. City of Dallas, 295 F.3d 471, 482 (5th Cir. 2002)) (alteration in original). We held that the regulation of adult cabarets featuring "semi-nude" performers[1] survived intermediate scrutiny because it did not impose a "substantial portion of the regulatory burden on protected speech without advancing the goals of the Ordinance." *Id.* at 530. Thus, imposing comparable burdens on a substantially overlapping set of cabarets cannot form a basis for a successful facial challenge. We are persuaded that the term "adult cabaret" does not render the Act overly broad.

"Adult-oriented establishment" and "Adult entertainment"

Next, Plaintiffs argue that the definitions of "adult entertainment" and "adult-oriented establishment" jointly render the Act unconstitutionally overbroad in its scope. "Adult-oriented establishment" is given a long, tri-partite definition:

> "Adult-oriented establishment" includes, but is not limited to, an adult bookstore, adult motion picture theater, adult mini-motion picture establishment, adult cabaret, escort agency, sexual encounter center, massage parlor, rap

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[1] "The Knox County Ordinance applied to establishments that "regularly feature[] persons who appear semi-nude," where "semi-nudity" meant "the showing of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of the male or female buttocks. This definition shall include the lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breasts exhibited by a bikini, dress, blouse, shirt, leotard, or similar wearing apparel provided the areola is not exposed in whole or in part." *Richland Bookmart*, 555 F.3d at 519.

> parlor, sauna;
>
> further, "adult-oriented establishment" means any premises to which the public patrons or members are invited or admitted and that are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises for the purpose of viewing adult-oriented motion pictures, or wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, when such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect.
>
> "Adult-oriented establishment" further includes, without being limited to, any adult entertainment studio or any premises that is physically arranged and used as such, whether advertised or represented as an adult entertainment studio, rap studio, exotic dance studio, encounter studio, sensitivity studio, model studio, escort service, escort or any other term of like import;

§ 7-51-1102(6) (line breaks added). An establishment that conforms to the terms of any one of the three parts is subject to the Act's provisions.

Plaintiffs' complaint centers on the second part of this definition. Plaintiffs contend that a grammatically correct reading requires treating the clause beginning with "or wherein" as a modifier for "any premises to which the public patrons or members are invited or admitted." Appellants' Rep. Br. at 16. This reading breaks up the provision as follows:

> Further, "adult-oriented establishment" means [1] any premises to which the public patrons or members are invited or admitted and
>
> [2A] that are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises for the purpose of viewing adult-oriented motion pictures,
>
> or [2B] wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, when such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect.

So construed, either [1] & [2A] *or* [1] & [2B] suffice to make an establishment an adult-oriented one. That means that "[a]ny place which presents adult entertainment is, by virtue of that fact an adult-oriented establishment and subject to the full force of the act . . . ." Appellants' Br. at 36.

Under this interpretation, the definition of "adult entertainment" becomes crucial to determining the scope of the Act. Broken up into its logical components, that definition reads:

> "Adult entertainment" means [1] *any exhibition of any* adult-oriented motion picture, live performance, display or dance of any type,
>
> [A] that has as a principal or predominant theme, emphasis, or portion of such performance,
>
> [i] any actual or simulated performance of

specified sexual activities[8] or

[ii] exhibition and viewing of specified anatomical areas,[9]

[iii] removal of articles of clothing or appearing unclothed,

[iv] pantomime,

[v] modeling, *or*

[vi] any other personal service offered customers;

§ 7-51-1102(3) (line breaks, numeration, and emphasis added). Plaintiffs point to two problems within this definition that, they claim, render the Act unconstitutionally overbroad when combined with the definition of "adult-oriented establishment."

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[8] "Specified sexual activities" are further defined to mean:

(A) Human genitals in a state of sexual stimulation or arousal;

(B) Acts of human masturbation, sexual intercourse or sodomy; or

(C) Fondling or erotic touching of human genitals, pubic region, buttocks or female breasts.

Tenn. Code Ann. § 7-51-1102(27).

[9] "Specified anatomical areas" are further defined to mean:

(A) Less than completely and opaquely covered:

(i) Human genitals;

(ii) Pubic region;

(iii) Buttocks; and

(iv) Female breasts below a point immediately above the top of the areola; and

(B) Human male genitals in a discernibly turgid state, even if completely opaquely covered.

Tenn. Code Ann. § 7-51-1102(24).

First, there is no explicit requirement that adult entertainment be *regularly* presented by or constitute *a principal use* of an establishment, in order for an establishment to be subject to the Act under the second part of the "adult-oriented establishment" definition. An establishment is subject to the Act if it "invites or admits" "public patrons or members" onto its premises, "wherein an entertainer provides adult entertainment," § 7-51-1102(6), defined as "*any* exhibition of any adult-oriented motion picture, live performance, display or dance of any type, that has as a principal or predominant theme" *any one* of the six listed activities [i] – [vi], § 7-51-1102(3). On Plaintiffs' reading, an establishment that offers "any" *single* performance, whose principal theme involves, for instance, the exhibition of specified anatomical areas, would be subject to the Act's requirements.

Second, Plaintiffs point out that a wide range of expressive conduct suffices to bring a performance or display within the scope of "adult entertainment." Appellants' Br. at 39. The themes that bring a performance under the umbrella of "adult entertainment," Plaintiffs insist, include those that do not describe erotic adult entertainment exclusively but are also characteristic of mainstream artistic expression. At the preliminary injunction hearing, Plaintiffs presented the testimony of Dr. Judith Hanna, a cultural anthropologist at the University of Maryland, who testified that there are "unlimited numbers" of "recognized performances" outside the adult-entertainment setting, whose predominant themes include nudity, simulated sex, and erotic touching between performers, and therefore, fit the

definition of "adult entertainment."[10] Plaintiffs further submit that each of the expressive activities listed – including "pantomime," "modeling," or "any other personal services offered customers" – suffices *on its own* to classify a performance as adult entertainment, so long as that activity constitutes a principal or predominant theme of the performance. Entertainment would be "adult," they argue, even if the removal of some articles of clothing, pantomime act, or modeling at issue did not involve "specified sexual activities" or the exhibition of "specified anatomical areas."

In sum, Plaintiffs argue that the *content* of *an individual performance* determines whether or not the Act is applicable to an *establishment* staging that performance. As a consequence, numerous mainstream artistic venues that contemplate including in their program even a single film, opera, ballet, or dance performance that fits the letter of the "adult entertainment" definition, are likely to be chilled from engaging in protected expression.

Were Plaintiffs' performance based interpretation of

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[10]Dr. Hanna offered numerous examples of ballet, dance, dramatic, and operatic performances, whose predominant themes conform to the principal or predominant themes listed in the definition of "adult entertainment," such as nudity, simulated sex, and touching between performers. In addition to performances frequently cited in similar law suits such as *Oh, Calcutta!*, *Salome*, and *Hair*, Dr. Hanna identified and described, *inter alia*, the following: George Balanchine's *Prodigal Son* ballet, which culminates in "an erotic encounter . . . that's portrayed on stage," involving "touching of the body"; Balanchine's *Bugaku*, whose main theme is erotic, and which culminates in a consummation of marriage; a ballet, *Mutations*, and dance performances, *Map Me* and *Untitled*, that are performed in the nude; as well as a number of others.

the Act's scope the only plausible reading, the Act would be overly broad on its face. If "adult entertainment" sweeps in mainstream artistic performances *and* if the presentation of a single performance suffices to subject an establishment to the Tennessee Act, then the Act applies to precisely the set of establishments that doomed the statutes noted earlier, which were invalidated by this and other circuit courts. *See Odle*, 371 F.3d at 399, *Triplett Grille*, 40 F.3d at 136; *Conchatta Inc.*, 458 F.3d at 266; *Carandola, Ltd.*, 303 F.3d at 516; *Ways*, 274 F.3d at 519.[11]

Facial invalidation is still inappropriate, however, if the statute is "readily subject to a narrowing construction by the state courts," *Erznoznik v. Jacksonville*, 422 U.S. 205, 216 (1975). "The key to application of th[e] [narrowing construction] principle is that the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional requirements." *American Booksellers Ass'n*, 484 U.S. at 397. While we will not rewrite a state or local law, neither will we "assume that state courts would broaden the reach of a statute by giving it an 'expansive construction.'"

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[11]As noted *supra* at 8–9 and as we explained in *Odle*, a law is overbroad because it fails to "except 'mainstream' artistic or entertainment venues," where protected expression that is "unlikely to spawn harmful secondary effects" is presented – not because it fails to except *other* public places where no protected expression is featured. 421 F.3d at 396; *see also Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 516 (4th Cir. 2002) (explaining that a North Carolina statute was overbroad not because it applied to *many* sites "far beyond bars and nude dancing establishments," but because it applied specifically to sites where mainstream artistic expression commonly takes place). Thus, the fact that the Act now before us purports to apply only to public venues that provide "adult entertainment" – and not to all public places or all venues that sell liquor – does not mean that this Act threatens fewer potentially impermissible applications than did the statutes in *Odle* or *Carandola*.

Richland Bookmart v. Nichols, 137 F.3d 435, 441 (6th Cir. 1998). And, as we noted in the context of a related Tennessee statute, the presumption that state courts will favor the narrower of two plausible constructions "is consistent with Tennessee law that provides that such regulation of speech should be construed narrowly." *Ibid.* (citing *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 526 (Tenn. 1993)).

Defendants put forth an alternative construction of the challenged provisions and reject Plaintiffs' claim that the Act sets up a performance-based standard for regulating adult-oriented businesses. The second part of the "adult-oriented establishment" definition, Defendants argue, should not be read to mean that an isolated presentation of "adult entertainment" suffices to subject a business to the Act's regulation. Instead, the last clause, beginning with "or wherein" should be read as modifying "booths, cubicles, rooms, compartments or stalls," rather than "premises." Appellees' Br. at 28-9. Shelby County would read the provision as follows:

> Further, "adult-oriented establishment" means [1] any premises to which the public patrons or members are invited or admitted and that are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises
>
> [2A] for the purpose of viewing adult-oriented motion pictures,
>
> or [2B] wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, when such adult entertainment is held, conducted, operated or

maintained for a profit, direct or indirect.

That is, providing "adult entertainment" [2B] will only make an establishment "adult-oriented" if entertainment is conducted in some kind of compartments separated from the common area [1]. This reading considerably reduces, if not completely eliminates, the alleged regulatory burden on mainstream artistic performances, since such are not commonly conducted on premises with the specified interior arrangement.

We have noted that a limiting or narrowing construction of statutory language is sustainable when "an express exception in the law's text or *other specific language* made the law 'readily susceptible'" to such a construction. *Odle*, 421 F.3d at 396-97 (emphasis added). This Act does not have an "express exception" for performances that have serious artistic value or establishments devoted principally to offering such performances. *Cf. Farkas v. Miller*, 151 F.3d 900, 902 (8th Cir. 1998). However, the Act does contain "specific language" that lends itself to two meanings. We agree with Plaintiffs that Defendants' narrowing construction is the less grammatical of the two plausible interpretations of the language. We disagree, however, with the proposition that grammatical inelegance makes an interpretation unfair or unsustainable. Nor does the proposed narrowing construction require this court to trample on the principles of federalism by "rewriting" a state law. On the contrary, principles of federalism lead us to take seriously the declaration of Tennessee courts that regulations of speech are to be construed narrowly. *See Richland Bookmart*, 137 F.3d at 441 (citing *Davis-Kidd Booksellers, Inc.*, 866 S.W.2d at 526). We have explained that it would "be improper for this Court to *supply* limiting language . . . in order to preserve [a law's] constitutionality." *Triplett*

Grille, 40 F.3d at 136 (emphasis added). The Tennessee Act does not compel us to "supply" limiting language. At most, it requires that we treat the comma between "pictures" and "or wherein" as a drafting oversight, of the kind that would normally be remedied by enclosing it in brackets and denoting it with "sic."[12] Absent any other textual signals that the comma was intended to broaden the reach of the Act, there is no rule of law that compels us to assert the strictest tenets of English grammar over the demonstrable intent of the legislators.[13]

The central inquiry in overbreadth analysis is whether protected expression will be burdened by the actual enforcement of the Act or chilled by virtue of its sheer presence on the books. With regard to the former, we are persuaded that the risk of *actual* enforcement of the Act against mainstream artistic establishments is quite low; unlike the lawmakers of Akron in *Triplett Grille*, 40 F.3d at 131, and Decatur County in *Odle*, 421 F.3d at 396, who conceded that their regulatory schemes applied to mainstream artistic performances, Tennessee and Shelby County disavow such a broad reading of this Act. *See* Appellees' Br. at 38–39.[14] With regard to the latter risk, we

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[12] As we do with statutory language routinely. *See, e.g.*, *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 406 (6th Cir. 1997); *Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 558 (6th Cir. 2006).

[13] Indeed, established principles of statutory construction counsel that "the strict language" of a statute yields to "the intention of the drafters," should that intention be "demonstrably at odds" with the results obtained by strict interpretation. *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

[14] Cases of overzealous enforcement against mainstream (continued...)

seriously doubt that operators of any mainstream artistic venue are likely to scrutinize the provisions of a regulatory scheme aimed at "*adult-oriented* businesses," conclude that the scheme will require their venues to obtain a license if certain performances are offered, and be thereby deterred from staging *Salome*, *Prodigal Son*, or *Bugaku* – on the basis of a single comma.

We think that the definition of "adult-oriented establishment" is "readily susceptible" to the narrowing construction that Defendants advocate. We recognize that this does not automatically address the second problem with the definition of "adult entertainment" – the apparent self-sufficiency of a predominant emphasis on "pantomime," "modeling," or "any other personal service offered customers" to transform a performance or exhibition into "adult entertainment." "[T]he risk that this definition might chill a range of protected speech" may have led us "to find it unconstitutionally overbroad *if it stood alone*." *Deja Vu of Nashville, Inc.*, 274 F.3d at 388 (emphasis added). If we read "adult entertainment" in conjunction with the narrowly construed definition of "adult-oriented establishment," the hypothesized unconstitutional applications dwindle in number, if not disappear. One cannot readily imagine a non-adult modeling session or non-erotic pantomime performance taking place in individualized booths anymore than one

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[11] (...continued)
artistic venues, moreover, would and should invite litigation by the affected parties on an as-applied basis. *New York v. Ferber*, 458 U.S. 747, 774-74 (1982) (stating that when overbreadth is not substantial, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [a law's] sanctions, assertedly, may not be applied") (quoting *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)); *see also N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988).

can imagine Balanchine's ballets screened routinely in such a setting.

The domain of expressive activities triggering the "adult entertainment" label may be limited in yet another manner. In two decisions analyzing the Tennessee Act, a federal district court found that the definition of "adult entertainment" is not overbroad when the clause "any other personal service offered customers" is read in context. "The phrase read in context of the entire definition clearly *pertains* and is *limited to* that entertainment 'which has a significant or substantial portion of such performance, any actual or simulated performance of specified sexual activities or exhibition and viewing of specified anatomical areas.'" *Below, et al. v. Giles County Adult Oriented Establishment Board, et al.*, No. 1:01-0139, slip op. at *66 (M.D. Tenn. Sept. 30, 2005) (emphasis added); *Friedman, et al. v. Giles County Adult Oriented Establishment Board, et al.*, No. 1:00-0065 (M.D. Tenn. Sept. 29, 2005). We find that this is a sensible way to interpret all of the expressive activities contained in the "adult entertainment" definition, which may appear devoid of sexually explicit content in isolation (*i.e.*, removal of indeterminate articles of clothing, pantomime, modeling, or other personal services). Following "the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated," *Williams*, 128 S. Ct. at 1839, these activities constitute "adult entertainment" only when they implicate "specified sexual activities" or "specified anatomical areas."[15]

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[15]The same "commonsense canon" serves to make more precise the meaning of "rooms" in the challenged portion of the "adult-oriented establishment" definition. At oral argument, Plaintiffs

(continued...)

We find that the Tennessee Act is readily susceptible to a narrowing construction that would clearly except mainstream artistic venues from the licensing and regulatory scheme. Because we find it improbable that any performances of serious artistic value qualifying as "adult entertainment" would be staged in individualized booths, the number of ostensibly impermissible applications of the Act is negligible and does not rise to the level of real and substantial overbreadth. The district court did not err, therefore, in denying the preliminary injunction on the basis that Plaintiffs did not demonstrate a substantial likelihood of success in their challenges to the definitions of "adult cabaret," "adult oriented establishment," and "adult entertainment."

D

Plaintiffs' second challenge is to some of the activities prohibited by the Act. The Act contains the following prohibitions:

> (a) No operator, entertainer or employee of an adult oriented establishment, either on the

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[12] (...continued)
attempted to argue that even if Defendants' narrowing construction is accepted, the Act is still overbroad because it applies to establishments "so physically arranged as to provide . . . rooms . . . separate from the common areas of the premises," wherein adult entertainment is presented. Plaintiffs argued that the several separate auditoria in mainstream movie theaters, for example, are such "rooms." We disagree, and find that "rooms" must be interpreted by reference to the neighboring terms (*i.e.*, booths, cubicles, compartments, and stalls). *See Williams*, 128 S. Ct. at 1839 (narrowing the meaning of "promotes" and "presents" to activities with a "transactional connotation," by reference to the other verbs in the series – "advertises," "distributes," and "solicits.")

premises or in relation to the person's role as an operator, entertainer, or employee of an adult-oriented establishment, shall permit to be performed, offer to perform, perform, or allow patrons to perform sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia.

(b) No operator, entertainer or employee of an adult-oriented establishment shall encourage or permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any operator, entertainer or employee.

(c) No entertainer, employee, or customer shall be permitted to have any physical contact with any other on the premises during any performance and all performances shall only occur upon a stage at least eighteen inches (18") above the immediate floor level and removed at least six feet (6') from the nearest entertainer, employee, or customer.

(d) (1) No employee or entertainer, while on the premises of an adult-oriented establishment, may:

(A) Engage in sexual intercourse;

(B) Engage in deviant sexual conduct;

(C) Appear in a state of nudity; or

(D) Fondle such person's own genitals or those of another.

(2) For the purpose of this section, "nudity"

> means the showing of the human male or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

Tenn. Code Ann. § 7-51-1114. Plaintiffs contend that the prohibitions contained in § 7-51-1114(b) and § 7-51-1114(c) are overbroad, especially in the context of the other prohibitions in § 7-51-1114. The prohibitions are allegedly overbroad because they apply to mainstream performances of artistic value – on Plaintiffs' reading of the Act's "adult oriented establishment" definition – and would effectively prohibit all the performances about which Dr. Hanna testified. Since we determine that the Act is susceptible to a narrowing construction that excepts mainstream artistic venues from its reach, this line of argument is unavailing.

Further, Plaintiffs claim that the prohibitions are overbroad even if applied only to adult-oriented venues such as their own adult cabarets because the breadth of physical contact prohibited goes beyond what is necessary to address secondary effects and "impermissibly limits the expressive palette available to [erotic] performers." Appellants' Rep. Br. at 14. In particular, § 7-51-1114(b) is allegedly overbroad because it prohibits a performer's "touching" or "caressing" herself or himself in the course of her or his performance. Such restrictions, Plaintiffs assert, "directly circumscribe[] the potential message" inherent in erotic dancing. Dr. Hanna testified that, for example, a prohibition on "plac[ing] hands on the person's hip [or] buttocks . . . would be silencing part of their artistic expression," as would a

prohibition on "calling attention to [one's] body parts . . . [by] plac[ing] hands down the sides of [one's] breasts or cup[ping] them." Appellants' Br. at 24. Similarly, the prohibition on any contact, no matter how innocent, between performers during a performance contained in § 7.51.1114(c), ("[n]o entertainer . . . shall be permitted to have any physical contact with any other on the premises during any performance"), is alleged to be overbroad for the same reasons. The impact of these measures is claimed to be all the more burdensome because "[n]othing in the Act limits the application of these restrictions to only those occasions when performers are scantily clad": a performer "may not touch a fellow dancer in a beekeeper's suit." Appellants' Rep. Br. at 12. So burdening the expressive elements of erotic dance, Plaintiffs urge, is unrelated to the Act's stated purposes and needlessly suppresses protected erotic expression.

We have consistently recognized that "nude or nearly nude dancing conveys an endorsement of erotic experience, and is a protected form of expression[,] in the absence of some contrary clue." *Richland Bookmart, Inc.*, 555 F.3d at 528 (quoting *DLS, Inc.*, 107 F.3d at 409) (internal quotation marks omitted). Nonetheless, a content-neutral time, place, or manner regulation may burden this form of expression so long as the burden is no greater than necessary to advance a legitimate government objective, *O'Brien*, 391 U.S. at 377, and does not unreasonably limit alternative avenues of communication, *Renton*, 475 U.S. at 47. Since the challenge to these provisions is brought on the grounds of overbreadth, we must also determine whether the impermissible applications – *i.e.*, those that are unnecessary to advance the interests at hand and/or that excessively limit alternative avenues – are substantial in number, absolutely and relative to permissible

applications.

Considering the constitutionality of nudity bans in adult establishments, we have invoked the Supreme Court's determination that "nudity itself is not essential to the eroticism that brings dancing under the protection of the First Amendment." *Richland Bookmart, Inc.*, 555 F.3d at 530. Therefore, a ban on nudity does not effect a "complete ban on expression," but "merely," and not unreasonably, "limits one particular means of expressing the kind of erotic message being disseminated." *Ibid.* (internal quotation marks and citation omitted); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 292-93 (2000).

The district court, relying on the Tennessee Court of Appeals' decision in *American Show Bar Series, Inc. v. Sullivan County*, 30 S.W.3d 324 (Tenn. Ct. App. 2000), suggested that both nudity and the prohibited touching are "beyond the 'expressive scope of dancing itself' and . . . not protected by the First Amendment." (citing *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253 (5th Cir. 1995)). In other words, the district court and the Tennessee Court of Appeals deemed these restrictions to be constitutional because the expressive elements in the prohibited physical contact are so minor as to be negligible, and do not interfere with a performer's communication of eroticism to its audience. Whatever modicum of expressive conduct is proscribed, "nothing in constitutional jurisprudence . . . suggest[s] that patrons are entitled under the First Amendment to the maximum erotic experience possible." *American Show Bar*, 30 S.W.3d at 340 (quoting *Threesome Entertainment v. Strittmatter*, 4 F. Supp. 2d 710, 724 (N.D. Ohio 1998)).

Plaintiffs contest this characterization of the prohibited activities and invoke the Seventh Circuit's

reasoning in *Schultz*, 228 F.3d 831. In that case, the Seventh Circuit determined that a prohibition on the "*depiction* of specified sexual activities"[16] burdened the protected elements of erotic expression much more than a minimal attire requirement imposed by a nudity ban. *Schultz*, 228 F.3d at 847-48 (emphasis added). While requiring dancers to wear pasties and G-strings "is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message," "restricting the particular movements and gestures of the erotic dancer . . . unconstitutionally burdens protected expression[,]" because it "deprives the performer of a repertoire of expressive elements with which to craft an erotic, sensual performance and thereby interferes substantially with the dancer's ability to communicate her erotic message." *Schultz*, 228 F.3d at 847.

Before we determine whether and to what extent the challenged prohibitions interfere with the communication of an erotic message, however, we need to identify with greater care what exactly is prohibited. *See Williams*, 128 S. Ct. at 1838 ("[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers."). Reading § 7-51-1114 as a whole, we are not persuaded that § 7-51-1114(b) must be interpreted in the manner Plaintiffs proffer. The provision prohibits an "operator, entertainer or employee" from "*encourag[ing] or permit[ting]* any person upon the premises to touch, caress or fondle" the listed anatomical areas of "any

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[16]Defined to include "'the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts,' sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, masturbation, or sodomy[,] and excretory functions in connection with sexual activity." 228 F.3d at 836-37.

operator, entertainer or employee." (emphasis added). If the drafters intended to prohibit self-touching, the chosen construction is ill-fitted to the task: to forbid an entertainer from touching herself, one would not commonly direct her not to "*encourage or permit*" herself "to touch or fondle" herself. A straight-forward way to formulate such a prohibition is to mandate, for example, that "no employee or entertainer . . . may[] [f]ondle such person's own genitals" or other anatomical areas — as the drafters of the Act did in § 7-51-1114(d). The latter section illustrates that the drafters knew how to formulate an unambiguous prohibition on touching or fondling oneself and others. Moreover, there is no good reason to suppose that the direct and unambiguous prohibitions in § 7-51-1114(d) are not exhaustive.

We read the challenged section 1114(b) as an enactment of vicarious liability for operators or employees who *encourage or permit* patrons or entertainers to touch *other* entertainers, perhaps without the latter's explicit consent. All the provisions in section 1114 that concern touching or physical contact are intended to further one goal: the elimination of the kind of sexual contact that is typically attended by adverse secondary effects, such as disease or prostitution. The Act advances that goal in more than one way: first, it explicitly prohibits employees and entertainers from certain kind of touching of self and others, § 7-51-1114(d)(1)(D) (no "fondling" of one's "own genitals or those of another"), § 7-51-1114(d)(1)(B) (no engaging in "deviant sexual conduct"), § 7-51-1114(a) (no performing "sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia"). Second, the Act also includes prophylactic measures that diminish the opportunities for the occurrence of prohibited sexual contact. The six-foot buffer zone is one such measure: it obviously makes it difficult for any contact to occur

between persons separated by that distance, but does not in itself prohibit contact. *See DLS, Inc.*, 107 F.3d at 411.

The prohibition on "encouraging or permitting" physical contact is another such measure: it makes it difficult for operators and employees to circumvent the ban on sexual contact by encouraging patrons to initiate sexual contact with entertainers or other employees without the latter's explicit complicity. Section 7-51-1114(b) does not effect any additional prohibitions on physical contact beyond what is already prohibited in other sections. It merely spells out that an employee will be in violation of the Act for encouraging prohibited conduct even if the employee did not engage in it himself, mirroring the general statement of responsibility for violations of the Act. *See* § 7-51-1113(d) (making an operator responsible for failure to "exercise due diligence in taking reasonable efforts to prevent acts or omissions of any entertainers or employees constituting a violation" of the Act).

That the prohibition on encouraging or permitting contact applies to more anatomical areas than the direct prohibitions on contact in other sections is not problematic: it is no different from "*the addition* of a buffer zone to the ban on contact" we addressed in *DLS, Inc.*, 107 F.3d at 411 (emphasis added). Both prophylactic measures are reasonably believed to be "necessary to achieve" the goal of preventing prohibited contact, "given the repeated violations of the no contact rule," and the "difficult[y] [of] determin[ing] . . . who was responsible" for the violations. *Ibid.* It is not unreasonable to require that an operator refrain from encouraging a patron to touch a performer's breast, for example, because that action is likely to lead to the kinds of sexual contact that

is explicitly prohibited.[17] Because we do not interpret this provision as creating any additional constraints on a performer's own movements, we do not think it "regulat[es] nude dancing with such stringent restrictions that the dance no longer conveys eroticism nor resembles adult entertainment," *Schultz*, 228 F.3d at 847, and is thus distinguishable from the provision considered in *Schultz*.

The second prohibition Plaintiffs challenge also warrants more careful construction: "No entertainer, employee, or customer shall be permitted to have any physical contact with any other on the premises during any performance," and to that effect, "all performances shall only occur . . . removed at least six feet (6') from the nearest entertainer, employee, or customer." § 7-51-1114(c). This provision should be read in the same manner as we read a similarly worded provision in *Deja Vu of Nashville*[18] that concerned entertainer-customer contact:

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[17]It is also possible – although not necessary – to read the provision as directing *third parties* (*i.e.*, operators or non-performing employees) not to encourage or permit an entertainer to touch *herself* in the course of her performance, even in a manner that the entertainer herself is not directly prohibited from doing. We think that common sense counsels against such an interpretation. Here too, however, any possible unreasonable enforcement of the provision should invite litigation by the affected parties on an as-applied basis. "[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [a law's] sanctions, assertedly, may not be applied." *Ferber*, 458 U.S. at 773-74 (citation omitted).

[18]The provision in question read:

> No customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a
>
> (continued . . .)

> Rather than reading the provision as enacting two separate requirements, we read it as a *single mandate*, with the "no touch" portion setting forth a broad policy statement that no contact between dancers and customers shall occur during performances, and the "buffer zone" rule showing the specific way to implement that policy by prohibiting clubs from allowing customers within three feet of the stage during dances. Therefore, the provision places a duty not on the entertainer to avoid touching customers, but on the owners and operators of clubs to protect entertainers from being touched by customers by requiring customers to stay three feet away from the stage. . . . It would simply be nonsensical for [the government] to put the onus of customer control on the entertainer who is already removed at least three feet from the customer, is engaged in live entertainment, and is, by definition, incapable of preventing an approaching customer from touching her without engaging in the prohibited touching herself.

Deja Vu of Nashville, Inc., 274 F.3d at 397-98 (emphasis added). Likewise, the provision before us requires only that a six-foot distance between an entertainer and any

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[18](...continued)
performance of live sexually oriented entertainment. All performances of live sexually oriented entertainment shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer.

Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, 274 F.3d 377, 390 (6th Cir. 2001).

other entertainer, employee, or customer be assured during performances, and that performances take place on an eighteen-inch stage. These spatial requirements ensure that no contact occurs between a performer and any other person during a performance.[9] Analogous to § 7-51-1114(b), the six-foot buffer-zone and eighteen-inch elevation rules spell out what "due diligence" requires of operators to prevent violations of the explicit prohibitions of the Act. Because the first clause does not impose additional prohibitions or duties beyond the buffer and height requirements contained in the second clause, this provision is identical to the one we upheld in the context of an as-applied challenge in *DLS, Inc.*, 107 F.3d at 413.

Plaintiffs' efforts to distinguish our decision in *DLS, Inc.* on the basis that we did not adjudicate an overbreadth challenge, Appellants' Reply Br. at 15, are unpersuasive. In that case, we found that Chattanooga's six-foot buffer requirement survived intermediate scrutiny under *O'Brien* and *Renton* it furthered important content-neutral state interests of crime- and disease-prevention, the evidence relied on by Chattanooga made it "reasonable to conclude that the six-foot rule would further the state interests," and it was "sufficiently narrowly tailored to be [a] valid regulation under the First Amendment." *DLS, Inc.*, 107 F.3d at 410-3. Since

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[9]We do not think the provision intends to prohibit all contact *among customers* or *nonperforming employees* beyond what is explicitly prohibited in other sections, as an exceedingly literal reading may suggest. In any case, neither Plaintiffs nor Defendants address the possibility that the County may penalize adult establishments for casual contact among their customers or non-performing employees during a performance. Accordingly, we do not consider this hypothetical possibility sufficiently "actual" to weigh in our overbreadth analysis, and leave any contentious applications of this provision to as-applied adjudication.

Chattanooga's buffer-zone requirement did not impermissibly burden expression in adult cabarets similar to Plaintiffs', such a requirement cannot form a basis for a successful overbreadth attack – at least not without a demonstration of a "substantial number" of unconstitutional applications beyond those considered in *DLS, Inc.*. *See Richland Bookmart, Inc.*, 555 F.3d at 532; *see also 729, Inc.*, 515 F.3d at 492 (holding that a requirement "that an entertainer stay at least five feet away from areas being occupied by customers for at least one hour after the entertainer performs semi-nude on stage" survives intermediate scrutiny); *Deja Vu of Nashville, Inc.*, 274 F.3d at 396 (holding that a prohibition on customer-entertainer contact during performances and a three-foot buffer zone survives intermediate scrutiny).

Plaintiffs do not bring to our attention any other allegedly unconstitutional applications beyond those deemed insufficient to prevail on an as-applied challenge in *DLS, Inc.*. Therefore, the district court did not err in finding that Plaintiffs did not establish a substantial likelihood of prevailing on the merits of their overbreadth challenge to § 7-51-1114(b) and § 7-51-1114(c).

E

Next, Plaintiffs claim that the definitions of "adult cabaret" and "adult entertainment" render the Act unconstitutionally vague. Plaintiffs complain that they cannot "ascertain[] where the outer boundaries of the Act lie," such that they may "shape their conduct so as to avoid them." Appellants' Br. at 48. The complaints of vagueness are coterminous with Plaintiffs' complaints of overbreadth. The definition of "adult cabaret" is vague, Plaintiffs allege, because there is nothing in the Act "to explain[] or cabin the phrase 'entertainment of an erotic

nature.'" Appellants' Br. at 50. Because we found that the definition of "adult cabaret" is not overbroad, we can readily supply the explanatory or "cabining" language that Plaintiffs assert is wanting. Establishments that "feature entertainment of an erotic nature, including exotic dancers, strippers," and so on, are merely examples, and do not augment the reasonably clear meaning of "adult cabaret" offered in the first sentence of that definition. It is therefore unnecessary to ask the questions to which Plaintiffs intimate there are no answers (*e.g.*, "What is an exotic dancer?"). *Ibid.*

The definition of "adult entertainment" is the next target of a vagueness charge. Recalling that this term means "any exhibition . . . that has as a principal or predominant theme . . . any actual or simulated performance of specified sexual activities[,] . . . removal of articles of clothing or appearing unclothed," Plaintiffs intend to demonstrate vagueness by posing questions based on that definition: "Would an adult nightclub be subject to the Act if dancers there began their performances in street clothes or evening gowns and stripped to bikini bathing suits?"; "Is it adult entertainment . . . [t]o remove one's coat and hat on stage? To shed an outer garment?" Appellants' Br. at 51.

Under the narrowing construction to which the Act is readily susceptible, all these questions are readily answered. If the "stripping to bikini bathing suits" is taking place in "booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises" and is staged for profit "direct or indirect," then the establishment is subject to the Act. In sum, a narrowing construction sufficiently clarifies the parts of this Act allegedly contaminated by vagueness. Thus, the district court did not err in holding that a vagueness challenge is

not likely to succeed on the merits.

F

Plaintiffs' last claim – that the Act's requirements will result in a drastic reduction in the "quantity and accessibility of speech," Appellants' Br. at 53 – is also predicated on the acceptance of Plaintiffs' overbreadth and vagueness claims. Since we do not accept Plaintiffs' overly literal and expansive reading of the Act's terms, we are equally unpersuaded that the Act's provisions are "so onerous" as to cause the majority of Memphis's nightclubs to "cease presenting adult entertainment entirely."

Finally, Plaintiffs contend that the district court erred in its determination that the balance of equities disfavored a temporary injunction in their favor. Because the district court correctly determined that Plaintiffs have not demonstrated a likelihood of success on the merits of their claim, the issue of balancing equities is moot. *See Hamilton's Bogarts, Inc.*, 501 F.3d at 649 ("[I]n a First Amendment case, the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits. This is so because, as in this case, the issues of the public interest and harm to the respective parties [i.e. balancing equities] largely depend on the constitutionality of the statute" (internal quotation marks and citation omitted)).

III

For the foregoing reasons, we AFFIRM the district court's denial of a preliminary injunction.

CONCURRING ONLY IN THE JUDGMENT

KAREN NELSON MOORE, Circuit Judge, concurring only in the judgment. I believe that the district court did not abuse its discretion by denying the plaintiffs' motion for a preliminary injunction. I do not join the majority's opinion, and I concur solely in the judgment affirming the district court's judgment that the plaintiffs have not satisfied the requirements for a preliminary injunction of the challenged provisions, Tennessee Code Annotated § 7-51-1114(b) & (c).

FILED
Nov 25, 2009
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-5494

ENTERTAINMENT PRODUCTIONS, INC., et al.,
Plaintiffs - Appellants,

v.

SHELBY COUNTY, TENN., et al.,
Defendants - Appellees,

ROBERT E. COOPER, JR., Attorney General,
Intervenor Defendant - Appellee.

Before: BOGGS, MOORE, and SUTTON, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's denial of plaintiff Entertainment Productions, Inc.'s motion for a preliminary injunction is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ENTERTAINMENT PRODUCTIONS, INC., a Tennessee Corporation, d/b/a CHRISTIE's CABARET, et al.,	)	
	)	No. 08-2047
Plaintiffs,	)	
v.	)	
	)	
SHELBY COUNTY, et al.	)	
	)	
Defendants.	)	

ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION

Before the Court is Plaintiffs' Motion for Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. At issue in this case is the local adoption of the Tennessee Adult-Oriented Establishment Registration Act ("Act"), Tenn. Code Ann. §§ 7-51-1101 et seq., in Shelby County, Tennessee. Plaintiffs allege that a preliminary injunction should issue for the following reasons: (1) the Act violates the First Amendment to the United States Constitution; (2) the Act is unconstitutionally overbroad on its face; (3) the Act is unconstitutionally vague; and (4) the Act is not applicable within the City of Memphis due to its present ordinances. The Court finds that Plaintiffs have not demonstrated a substantial likelihood of success on the merits of these

claims. Additionally, the Court finds that the remaining factors for injunctive relief do not weigh in Plaintiffs' favor. Accordingly, Plaintiffs' Motion for Preliminary Injunction is DENIED.

I. BACKGROUND

On September 10, 2007, Shelby County adopted the Act in order to provide "a method of regulating sexually-oriented businesses to address their deleterious secondary effects without regard to the content of speech." Shelby County, Tenn., Ord. 344. The Act was adopted following the review of several reports on the effects of such establishments in Shelby County and the City of Memphis. Id. Ordinance 344 relied upon the Tennessee legislative findings of "recognized deleterious secondary effects commonly associated with adult-oriented establishments, including but not limited to an increase in crime, the spread of sexually-transmitted diseases, the downgrading of property values, and other public health, safety, and welfare issues." Id.; see also 2006 Tenn. Pub. Acts, ch. 943. The Act became effective in Shelby County on January 1, 2008 and will be enforced following a one-hundred-twenty day grace period.

Plaintiffs in this action operate, within the City of Memphis and Shelby County, establishments at which "dance performances of a sexually candid nature are presented for the entertainment of patrons and guests."[1]

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[1] For purposes of clarity, the Court notes that it will refer to Plaintiffs' establishments as "sexually oriented businesses" or "adult establishments" throughout this motion. The Court will refrain from using "adult cabaret" or "adult-oriented establishments," except when specifically discussing these specific statutory provisions, as Plaintiffs challenge these terms-of-art as vague and overbroad.

Pl.'s Mem. of Law in Support of Mot. for Prelim. Injunction, "Pl.'s Mem." at 3. Specifically, Plaintiffs allege that a preliminary injunction should issue for the following reasons: (1) the Act violates the First Amendment because Shelby County relied upon demonstrably "shoddy" evidence to support its enactment; (2) the Act violates the First Amendment because its application will substantially diminish the availability of adult speech in Memphis; (3) the Act's prohibition on exposure of "specified anatomical areas" violates the First Amendment; (4) the Act's no-touching provision violates the First Amendment; (5) the Act's definitions of "adult cabaret" and "adult entertainment" are unconstitutionally overbroad because they include a myriad of non-adult establishments with no connection to the secondary effects of sexually oriented businesses (6) the Act's definitions of "adult cabaret" and "adult entertainment" are unconstitutionally vague; and (7) the Act should not be applicable within the City of Memphis based upon its existing ordinances.

II. STANDARD OF REVIEW

A preliminary injunction is an extraordinary remedy requiring the party seeking such relief to demonstrate a clear entitlement to the injunction under the given circumstances. Overstreet v. Lexington-Fayette Urban Cty. Gov't., 305 F.3d 566, 573 (6th Cir. 2002). The purpose of a preliminary injunction is to preserve the status quo until the district court can hold a trial on the merits. United States v. Edward Rose & Sons, 384 F.3d 258, 261 (6th Cir. 2004). In determining whether a party is entitled to a preliminary injunction, the Court must consider the following four factors: (1) whether the movant has demonstrated a substantial likelihood of success on the merits; (2) whether the movant will suffer irreparable

harm if the injunction is not issued; (3) whether the issuance of the injunction will cause substantial harm to others if issued; and (4) whether the public interest is served by issuance of the injunction. Nightclubs, Inc. v. City of Paducah, 202 F.3d 884 (6th Cir. 2000). "These factors are not prerequisites, but are factors that are to be balanced against each other." Edward Rose, 384 F.3d at 261. The inquiry into whether the movant has demonstrated a likelihood of success on the merits is often determinative of whether the injunction should issue in cases that substantially implicate First Amendment concerns. Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville, 274 F.3d 377, 400 (6th Cir. 2001). Thus, the Court will focus its analysis on Plaintiffs' likelihood of success on the merits. The Court will then briefly discuss the remaining factors to determine if injunctive relief is appropriate.

III. ANALYSIS

A. FIRST AMENDMENT

1. Constitutionality

Initially, the Court will consider whether Plaintiffs have a substantial likelihood of success on their claims that the Act's provisions violate the First Amendment. Specifically, Plaintiffs allege that (1) the evidence relied upon to link adult businesses to adverse secondary effects is "demonstrably shoddy," (2) the Act will virtually eliminate live adult entertainment in Memphis, (3) the prohibition on exposing "specified anatomical areas" is unconstitutional, and (4) the no-touching restriction is unconstitutional.

It is well-settled that the expressive conduct of erotic

dancing lies "within the outer perimeters of the First Amendment, though we view it as only marginally so." Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (plurality opinion). As such, erotic dancing is guaranteed "only the barest minimum of protected expression." Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975). Even when First Amendment rights are involved, the expression involved in these challenges "is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976).

Generally, regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986). However, content-neutral time, place, and manner restrictions are acceptable under the First Amendment so long as they are "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." Id. Although laws restricting sexually oriented "porn-type speech" are content-based, see Richland Bookmart, Inc. v. Nichols, 137 F.3d 435, 439 (6th Cir. 1998), such speech should be "*treated* as if it were content-neutral because . . . it is less than fully protected," id. (emphasis in original); see also American Mini Theatres, 427 U.S. at 70-71. The Supreme Court's rationale for this distinction is that a court may seek to regulate the secondary effects of speech rather than the speech itself "without violating the government's paramount obligation of neutrality in its regulation of protected communication." Renton, 475 U.S. at 49 (quoting American Mini Theatres, 427 U.S. at 70).

In order for a regulation on such adult expression to pass constitutional muster, it must survive the following

four-prong test: (1) the law must be passed within the constitutional power of the government; (2) the law must further an important or substantial government interest; (3) the governmental interest must be unrelated to the suppression of free expression; and (4) the incidental restriction on the First Amendment freedoms must be no greater than is essential to the furtherance of that interest. United States v. O'Brien, 391 U.S. 367, 377 (1968).

The Court initially notes that the Tennessee Court of Appeals has already meticulously analyzed the Act under each step of the O'Brien test. See American Show Bar Series, Inc. v. Sullivan Cty., 30 S.W.3d 324 (Tenn. Ct. App. 2000), perm. app. denied, (Tenn. Mar. 15, 2000). As to the first prong, the Court found that the "protection of public health, safety, and welfare falls squarely within the constitutional police powers of the local government." Id. at 335 (citation omitted). Next, the court found that the second prong of O'Brien was satisfied because courts have "consistently found that the prevention of crime and disease" is an important or substantial government interest. Id. at 336; see also DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 410 (6th Cir. 1997). Additionally, the "combating of secondary effects of adult-oriented establishments is an interest that is not directly related to the suppression of protected speech" and thus satisfies the third prong. Id. (citing Barnes, 501 U.S. at 585 ("on its face, the governmental interest in combating prostitution and other criminal activity is not at all related to expression.")). Finally, the Court analyzed each challenged provision of the Act to determine whether it was narrowly tailored to achieve the government's

interests. Id. With the exception of one provision[2] that has since been repealed, the Court found that the Act complied with the fourth prong of O'Brien because the incidental restrictions on First Amendment freedoms were no greater than necessary. Id. at 336-341. Because the American Show Bar court has already rejected a challenge to the constitutionality of the Act under the O'Brien analysis and because the Sixth Circuit has rejected similar challenges[3], the Court will not revisit every element of the test. Instead, the Court will consider the distinct arguments raised by Plaintiffs on the validity of the Act.

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[2] Tennessee Code Annotated § 7-51-1113(j) (1998), which was repealed from the Act, required that a sign must be conspicuously displayed on premises that states that entertainers were "[n]ot permitted to demand or collect all or any portion of a fee for entertainment before its completion." Id. The trial court in American Show Bar struck this provision because the Act never prohibited such fee collection, and the Court of Appeals affirmed the trial court on that issue. 30 S.W.3d at 337-38. This provision is not at issue in the present case.

[3] Additionally, the Sixth Circuit considered the validity of another sexually-oriented business ordinance under the O'Brien test. Deja Vu, 274 F.3d 377 (6th Cir. 2002). Although this case did not involve the Act presently before the Court, the Deja Vu court nonetheless summarily noted that the "stated interests in reducing crime, open sex, and the solicitation of sex are substantial." Id. at 392 (citing Richland Bookmart, Inc., 137 F.3d at 440). Next, the Sixth Circuit noted that "regulations aimed at redressing the secondary effects of the sex industry are unrelated to the suppression of erotic speech." Id. (citing East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220, 226 (6th Cir. 1995)). Thus, the court found that the first three prongs of the O'Brien standard were undoubtedly present. Id. Accordingly, the Sixth Circuit only analyzed whether the challenged provisions of the ordinance were narrowly tailored under the fourth prong of O'Brien.

a. Demonstrably "Shoddy" Evidence

First, Plaintiffs allege that the evidence relied upon to link adult businesses to adverse secondary effects is demonstrably "shoddy." See City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438-39 (2002). A claim that the evidence is not sufficient to adopt the Act should be analyzed under the second prong of the O'Brien test, which analyzes whether the law was passed in furtherance of an important or substantial government interest. In such a challenge, the government has the initial burden of showing that it relied upon evidence that it "reasonably believed to be relevant" to addressing adverse secondary effects of adult entertainment. Renton, 475 U.S. at 51-52. Upon review of the record, the Shelby County ordinance adopting the Act cites numerous studies on the effects of adult entertainment in Memphis and Shelby County. Shelby County, Tenn., Ord. 344. These reports included studies from the Memphis Shelby County Crime Commission, the University of Memphis Center for Community Criminology and Research, the Memphis and Shelby County Division of Planning and Development, the District Attorney General's summary of illegal activity in Shelby County, and the Memphis City Court Clerk's Office report of citations issued at sexually oriented businesses. Id. The ordinance further relies upon the Tennessee legislative findings that the Act sought to "address some recognized deleterious secondary effects commonly associated with adult-oriented establishments, including but not limited to an increase in crime, the spread of sexually transmitted diseases, the downgrading of property values, and other public health, safety, and welfare issues." Id.; see also 2006 Tenn. Pub. Acts, ch. 943.

In light of the ordinance's lengthy and specific discussion of the studies relied upon to adopt the Act, the

Court finds that Plaintiffs are not likely to succeed on this challenge. Additionally, the Sixth Circuit has already determined that a legislative body "need not await localized proof of those effects" to enact restrictions on adult entertainment. DLS, 107 F.3d at 411 (quoting Barnes, 501 U.S. at 582-84 (concurring opinion)). As such, the record suggests that Shelby County exceeded the general requirements in enacting its ordinance. Thus, the Court finds that Shelby County is virtually certain to establish at the trial on the merits that it relied upon evidence it reasonably believed to be relevant when enacting the ordinance.

Once the government meets its initial burden, the challenger of a law may assert that the evidence relied upon by the government is "shoddy" or may produce evidence of its own tending to refute the proposition that sexually oriented businesses are connected to adverse effects. Alameda Books, 535 U.S. at 438-39. Although Plaintiffs promise that they will demonstrate the inadequacies of the evidence relied upon in adopting the Act and will point to additional evidence to disprove any connection between sexually oriented establishments and adverse secondary effects, they have not provided any such evidence at this time. Thus, because the Act has already been held to be within the legitimate scope of governmental restriction and to further an important or substantial government interest, see American Show Bar, 30 S.W.3d at 335-36, the Court finds that Plaintiffs do not have a substantial likelihood of success on the merits on this issue.

b. Economic Effects

Next, Plaintiffs claim that the Act will virtually eliminate all sexually oriented speech within the City of

Memphis. Plaintiffs base these assumptions on the declarations of Steven Cooper and Charles Gerald Westlund, the principals of Plaintiffs' corporations, who assert that the Act's provisions would have a strongly negative impact upon their businesses. Cooper Decl. ¶¶ 10-17; Westlund Decl. ¶¶ 9-15. Plaintiffs further allege that they operate a "substantial fraction" of all sexually oriented businesses in the City of Memphis, Pl.'s Memo at 34, and that there are no erotic dance clubs now operating in Shelby County other than those within the City of Memphis. Cooper Decl. ¶ 17. Accordingly, Plaintiffs contend that their prediction of the decline in adult-oriented speech if the Act were adopted is based upon "substantial experience in the adult entertainment industry, both in Memphis and elsewhere." Pl.'s Mem. at 34.

In DLS, the Sixth Circuit considered the economic impact of speech regulations within the fourth prong of the O'Brien test, which considers whether the ordinance is narrowly tailored. 107 F.3d 403, 413 (6th Cir. 1997). Relying upon the Supreme Court's decision in Renton, the Court found that "[t]he inquiry for First Amendment purposes is not concerned with economic impact. In our view, the First Amendment requires only that [the legislative body] refrain from effectively denying . . . a reasonable opportunity to open and operate" a sexually oriented business. Id. (quoting 475 U.S. at 54). The DLS court then noted that it would consider "economic effects of the ordinance in the aggregate, not at the individual level." Id. If the ordinance were *"intended* to destroy the market for adult cabarets, it might run afoul of the First Amendment, but not if it merely has adverse effects" on the individual establishment. Id. (emphasis added).

In the present case, the Court notes that Renton requires only that the government provide a reasonable opportunity to open and operate a sexually oriented establishment. 475 U.S. at 54. Nothing in the Act suggests that Plaintiffs' right to operate such a business would be foreclosed. First, Plaintiffs allege that the prohibition on serving or consuming alcohol on premises may create financially adverse consequences. See Cooper Decl. ¶ 10-11, 13; Westlund Decl. ¶ 12. The Supreme Court, however, has held that there is no constitutional right to offer both alcohol and adult-oriented entertainment. See California v. LaRue, 409 U.S. 109, 118 (1972); see also American Show Bar, 30 S.W.3d at 337 (finding that the Act's prohibition on serving or consuming alcohol at adult-oriented establishments was not constitutionally infirm). Likewise, the prohibition against serving or consuming alcohol does not restrict the type of expression that is permitted but merely restricts the circumstances in which it may be presented. This is well within the government's power to minimize the adverse deleterious effects of adult establishments. Renton, 475 U.S. at 49; American Mini Theatres, 427 U.S. at 70.

Next, Plaintiffs allege that the provision requiring a six-foot distance between performing entertainers and other entertainers, employees or customers would have a negative financial impact upon business. Cooper Decl. ¶ 14; Westlund Decl. ¶ 13. The provision specifically states that all performances should be at least six feet from the nearest entertainer, employee, or customer. Tenn. Code Ann. § 7-51-1114(c). Although Plaintiffs may not desire this regulation, "there is nothing in constitutional jurisprudence to suggest that patrons are entitled under the First Amendment to the maximum erotic experience possible." American Show Bar, 30 S.W.3d at 340. With this reasoning, the Tennessee Court of Appeals has found no

constitutional infirmity in the six-foot buffer zone required by the Act. Id. at 338. Additionally, numerous courts have found similar buffer-zone regulations in sexually oriented businesses to be constitutionally permissible. Id. (citing cases in accord); see DLS, 107 F.3d 408-13 (citing cases in accord). Thus, buffer zone restrictions between performing entertainers and other entertainers, employees, and customers are not considered to be prohibitions on opening or operating a sexually oriented business. Notwithstanding, a six-foot buffer zone between employees raises questions regarding constitutionality.

Finally, Plaintiffs mention generally that the other provisions of the Act will economically harm their businesses. Although Plaintiffs do not specifically mention the possible financial impact of the provisions regarding the degree of nudity allowed under the Act, the Court will address this as it is undoubtedly a central aspect of Plaintiffs' establishments. The United States Supreme Court has concluded that prohibitions on nude or topless dancing do not violate the First Amendment. Barnes, 501 U.S. at 571. Specifically, the Barnes court found that "the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic." Id. As such, regulations on the degree of nudity are not treated as prohibitions on opening or operating a sexually oriented business.

As a final consideration of whether the potential economic impact of sexually oriented businesses may violate the First Amendment, the Court will consider whether the Act "intended to destroy the market for adult cabarets." DLS, 107 F.3d at 413. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Aeroquip-Vickers, Inc. v. C.I.R.,

427 F.3d 173, 192 n.11 (6th Cir. 2003). In this case, Ordinance 344, as enacted by the Shelby County Board of Commissioners, contains lengthy references to the adverse effects sought to be remedied by the adoption of the Act. Thus, it is clear that the purpose of the Act is to minimize the deleterious secondary effects of sexually oriented businesses rather than to reduce sexually oriented speech. As already discussed, such regulations are generally constitutionally permissible. Accordingly, Plaintiffs have not demonstrated a substantial likelihood of success on the merits.

c. "Specified Anatomical Areas"

Next, Plaintiffs claim that the Act's prohibitions on exposing "specified anatomical areas" is unconstitutional under the First Amendment. See Tenn. Code Ann. § 7-51-1102(24). The Tennessee Court of Appeals has considered this provision and has determined that it is neither unconstitutionally vague nor overbroad. American Show Bar, 30 S.W.3d at 339-40. Further, it is well-established that bans on total or partial nudity are constitutional when the government seeks to regulate the deleterious adverse effects of sexually oriented establishments. Barnes, 501 U.S. at 570. As previously noted, such regulations do not "deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic." Id. As such, statutes regulating the degree of nudity in order to prevent adverse secondary effects generally fail the third prong of the O'Brien test because the government interest is unrelated to the suppression of free expression. Id. Based on the foregoing, Plaintiffs have not demonstrated a substantial likelihood of success on this prong.

d. "No-Touching" Provisions

Finally, Plaintiffs claim that the Act's no-touching provisions are unconstitutional. The Tennessee Court of Appeals has previously rejected this exact challenge to the Act. See American Show Bar, 30 S.W.3d at 338-39. In doing so, the Court relied upon the Fifth Circuit's analysis in Hang On, Inc. v. City of Arlington, 65 F.3d 1248, 1253 (5th Cir. 1995), in which the court rejected an overbreadth challenge and found that such contact is beyond the "expressive scope of dancing itself" and is not protected by the First Amendment. Id. at 1253. Although Plaintiffs in this case argue that contact between dancers is part of the erotic expression and should be protected, the Court notes that, even so, there is nothing in constitutional jurisprudence to suggest that patrons are entitled, under the First Amendment, to the maximum erotic experience possible. American Show Bar, 30 S.W.3d at 340. Because the six-foot "buffer zone" between has routinely been upheld, Id. at 338 (citing cases in accord); DLS, 107 F.3d at 408-13 (citing cases in accord), Plaintiffs' challenge to the constitutionality of the no-touching provision is unlikely to succeed on the merits.

2. Overbreadth

Next, the Court will consider Plaintiffs' challenge that the Act is unconstitutionally overbroad.[4] Specifically,

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[4] Plaintiffs need not establish the traditional requirement of standing to challenge that a statute is constitutionally overbroad on First Amendment grounds. Odle v. Decatur Cty., 421 F.3d 386, 393 (6th Cir. 2005). Otherwise stated, a plaintiff may assert the interests of others not before the court even if it is only their protected expression, not the plaintiff's, that the challenged ordinance is said to

(continued...)

Plaintiffs assert that "adult entertainment" and "adult cabaret" are defined in an imprecise manner that threatens to restrain the speech of a myriad of non-adult establishments with no conceivable connection to the adverse secondary effects of sexually oriented businesses. Pl.'s Mem. at 24; see Tenn. Code Ann. §§ 7-51-1101(2)-(3). As such, Plaintiffs contend that a wide range of artistic expression may be impermissibly squelched by the adoption of the Act. Id. at 24-36.

The purpose of the overbreadth doctrine is "to prevent the chilling of protected expression." Staley v. Jones, 239 F.3d 769, 779 (6th Cir. 2001). To declare an act as facially overbroad is an "extraordinary" remedy under the First Amendment. Odle v. Decatur Cty., 421 F.3d 386, 393 (6th Cir. 2005). A district court is required to "proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975) Accordingly, the invalidation of an act on overbreadth grounds is "strong medicine" that should be applied "sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

Generally, an act is facially overbroad under the First Amendment if it "reaches a *substantial* number of impermissible applications relative to the law's legitimate sweep." Deja Vu, 274 F.3d at 387 (quoting New York v. Ferber, 458 U.S. 747, 771 (1982)) (emphasis added). "Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the

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[4](...continued)
infringe. Id. (citing Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987); Council of Los Angeles v. Vincent, 466 U.S. 789, 801 (1984)).

challenged statute." Broadrick, 413 U.S. at 613 (citing cases in accord); see also Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 526 (Tenn. 1993). The critical analysis in determining whether an act is facially overbroad is whether it is "readily susceptible" to a limiting construction. Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988); Erznoznik, 422 U.S. at 214-16; Broadrick, 413 U.S. at 613. To meet this requirement, the statutory text must contain an express exemption or other specific language limiting its application. Odle, 421 F.3d at 396 (quoting Schultz v. City of Cumberland, 228 F.3d 831, 849-50 (7th Cir. 2000)). The rationale for examining the text of the statute is that the constitutionality should "depend more on the language the drafters employed than on the *post hoc* representations of the local officials charged with enforcing the ordinance." Odle, 421 F.3d at 397.

In the present case, Plaintiffs challenge two definitions used in the Act to specify the types of businesses and activities that fall within its purview. First, the Act's definition of "adult cabaret" states that it is an "establishment that features *as a principal use of its business,* entertainers, waiters, or bartenders who expose to public view of the patrons within such establishment, at any time, the bare female breast below a point immediately above the areola, human genitals, pubic region, or buttocks . . . ."[5] Tenn. Code Ann. § 7-51-1102(2)

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[5] Plaintiffs further claim that the phrase "as a principal use of its business" only modifies the first sentence of the "adult cabaret" definition but does not modify the successive sentence, which states as follows: "'Adult cabaret' includes a commercial establishment that features entertainment of an erotic nature, including exotic dancers, strippers, male or female impersonators, or similar entertainers."

(continued...)

(emphasis added). Likewise, the definition of "adult entertainment" means a "live performance, display or dance of any type, that has a *principal or predominant theme, emphasis, or portion* of such performance, any actual or simulated performance of specified sexual activities or exhibition or viewing of specified anatomical areas . . . ." Tenn. Code Ann. § 7-51-1102(3) (emphasis added). In light of these express textual provisions, the Court will determine whether Plaintiffs have a substantial likelihood of success on the facial overbreadth challenge.

In a case relied upon by the Sixth Circuit in its discussion of overbreadth, see Odle, 421 F.3d at 396-97, the Seventh Circuit had the opportunity to consider a virtually identical limiting provision, which defined an adult cabaret as an establishment that "*regularly features* . . . persons who appear in a state of nudity or semi-nude." Schultz, 228 F.3d 849 (emphasis added). Although the plaintiffs argued that this definition would "cover venues that present theatrical and artistic performances which feature nudity or sexual content, but also contain serious artistic, social or political value[,]" id. at 849, the court concluded that "a facial overbreadth challenge fails when the regulation's plain language is readily susceptible to a narrowing construction that would make it constitutional[,]" id. at 850 (citing American Booksellers,

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[5](...continued)
Tenn. Code. Ann. § 7-51-1102(2). Thus, Plaintiffs claim that the second sentence of this definition is overbroad because it is not limited. The Court does not find this argument to be persuasive. Because the second sentence of the definition states that it is merely elaborating upon what the first sentence "includes," id., these examples fall under the general definition provided in the first sentence, which is limited by the acts that are "a principal use of its business." Therefore, the Court concludes that Plaintiffs have no reasonable likelihood of success on this overbreadth claim.

484 U.S. at 397). The Schulz court found that the term "'regularly features' can be interpreted to mean 'always features.' Under this definition, a venue falls within the definitions . . . only if it features nudity, semi-nudity or specified sexual content as the permanent focus of its business and gives special prominence to such content on a permanent basis." Id. at 850. The Schultz court continued to make the following observations regarding the balancing of legitimate government interests with the likelihood of suppression of protected speech:

> [A narrowing] construction limits the Ordinance to adult-entertainment establishments, which always feature nudity, semi-nudity and specified sexual content, and excludes theatrical venues that present shows . . . for long stretches but not on a permanent basis. It is conceivable, though unlikely, that a theater might make the presentation of artistic performances featuring nudity its abiding focus. But even so, the Ordinance's unconstitutional applications would not be real and substantial in relation to its plainly legitimate sweep. . . . In a facial challenge like this one, there must be a realistic danger that the Ordinance will significantly compromise the First Amendment rights of parties not before the Court. *The plaintiffs suggest scenarios to which the Ordinance might apply on its face and would unconstitutionally restrict protected expression, but the Ordinance is readily susceptible to a narrowing construction that saves the potentially unconstitutional applications from dwarfing the Ordinance's legitimate reach.*

Schultz, 228 F.3d at 850-51 (footnotes and citations omitted) (emphasis added).

In light of Schultz, the Court finds the limiting language in the Act to be persuasive. The Act states that exposure of specified anatomical areas or the presentation of specified sexual activities must be the "principal use" of the business or the "principal or predominant theme" of the entertainment. See Tenn. Code Ann. § 7-51-1102(2) (3). In considering the definitions of these terms, "principal" must be the "most important, consequential, or influential" element of the establishment. Webster's Third New International Dictionary 1802 (3d ed. 1993). The term "predominant" requires that the emphasis, theme, or portion have "superior strength, influence, authority or position." Id. at 1786. In comparison, the Schultz court found the phrase "regularly features" to be sufficient, and "regularly" merely requires that the conduct be "recurring" or be at "stated, fixed, or uniform intervals." Id. at 1913. Thus, the language in the Act requiring certain entertainment be a central use limits the construction of the Act as much as, if not more so, than the Schultz language. Following the Schultz rationale that the Act's narrowing language is sufficient to confine the statute to those businesses that permanently feature sexually oriented entertainment and give "special prominence" to this type of entertainment, the Court concludes that Plaintiffs do not have a substantial likelihood of success on their claim that the Act is facially overbroad.

Before concluding the analysis of this issue, it is important to discuss the critical distinction between the instant case and the cases cited by Plaintiffs in which the Sixth Circuit and other courts have found various statutes and ordinances constitutionally overbroad. In those cases, the law at issue was what the Sixth Circuit generally referred to as a "'public place' ordinance." Odle, 421 F.3d at 395. Those ordinances were directed at virtually any nudity or simulated sexual activity at any public place. For

example, in Odle, the county ordinance prohibited nudity "at a wide range of public places where alcohol is sold, served, or consumed." Id. at 388. The Sixth Circuit noted that this definition was "effectively all-encompassing, exempting only restrooms, showers, medical facilities" and certain other specific venues. Id. at 392. In addition, the language of the law at issue in Odle was not readily susceptible to any limiting construction. Id. at 399. Likewise, in Triplett Grille v. City of Akron, the ordinance proscribed enumerated sexual conduct at any public place, regardless of whether intoxicating liquors were sold, served, or consumed. 40 F.3d 129, 131 n.2 (6th Cir. 1994). The Triplett Grille court concluded that the ordinance was unconstitutionally overbroad because the city did not "demonstrate a link between nudity in non-adult entertainment and secondary effects," and because the ordinance did not contain limiting provisions to apply it only in contexts where harmful secondary effects were likely to exist. Id. at 135. Thus, the Sixth Circuit found overbreadth where the laws were written to cover all public places and in the absence of limiting provisions narrowing the construction of the laws. The case presently before the Court is not in that category.

Likewise, Plaintiffs rely upon Giovani Carandola, Ltd. v. Bason, 303 F.3d 507 (4th Cir. 2002), and Conchatta, Inc. v. Miller, 458 F.3d 258 (3d Cir. 2006), for the proposition that the Act is overbroad. In Carandola, the court considered an overbreadth challenge to a state statute prohibiting any "conduct or entertainment by any person who is wearing transparent clothing that reveals private parts," any "entertainment that includes or simulates sexual intercourse or any other sexual act," and other simulated sexual activity. 303 F.3d at 510. The Carandola court relied upon the state's admission that "only a 'small percentage'" of those covered by this statute "present the

kind of adult entertainment that legitimately concerns the state. Among the 'vast majority' of permittees that do not are coliseums, theaters, hotels, and restaurants." Id. at 517. Thus, the Carandola statute is akin to the general "public place ordinance" at issue in Odle and Triplett Grille. Odle, 421 F.3d at 395. Triplett Grille, 40 F.3d at 135. Likewise, in Conchotta, the court considered an overbreadth challenge to a state liquor code provision that prohibited "lewd, immoral or improper entertainment" at any place holding a liquor license. 458 F.3d at 261. Again, the parties agreed that the statute sought to regulate many "ordinary restaurants, . . . dinner theaters, comedy clubs, and other venues" and even extends "to performance spaces that serve alcohol in the lobby during intermission." Id. at 266. Because the court found that the text of the code was not readily susceptible to a limiting construction, the court concluded that this statute was overbroad. Id. at 262-68. The Court finds that the present case is distinguishable from Odle, Triplett Grille, Carandola, and Conchatta because none of these statutes had any express limiting provisions in the text of the statute.

Because the Act at issue in this case expressly contains a limiting provision to those establishments with sexually oriented expression as a "principal use" of the business or "principal or predominant theme" of the entertainment, these cases are not persuasive. Furthermore, the Court notes that the United States District Court for the Middle District of Tennessee has also reached this same conclusion, finding that neither "adult entertainment" nor "adult cabaret" as defined in the Act is unconstitutionally overbroad. See Angele Kaye Belew v. Giles Cty., No. 1-01-0139, slip op. at 64-68 (M.D. Tenn. 2005). The Belew court similarly held that the express limiting language in the text of the statute is sufficient to survive an overbreadth challenge. Id. Because

the Act at issue has appropriate limiting language, the Court finds that Plaintiffs have not demonstrated a substantial likelihood of success on their claim that the Act is facially overbroad.

3. Vagueness

Next, the Court will consider whether Plaintiffs have a substantial likelihood of success on their claim that the Act is unconstitutionally vague. Specifically, Plaintiffs contend that the terms "adult cabaret" and "adult entertainment" as defined in the Act do not allow them to ascertain what entertainment is permissible. Pl.'s Mem. at 26; see Tenn. Code Ann. §§ 7-51-1102(2), (3).

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Vague laws are problematic because they may trap the innocent by not providing fair warning, may fail to provide explicit standards for those who apply to them, or may abut upon sensitive areas of basic First Amendment freedoms and operate to inhibit the exercise of such speech. Id. at 108-09. Therefore, a law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Id. at 108. In the context of First Amendment cases, the Supreme Court has imposed a more stringent rule which requires that statutes that impinge on the area of freedom of expression must have a greater degree of specificity than in other contexts, so as to insure that citizens will not be chilled from exercising their constitutional right to free expression. Smith v. Goguen, 415 U.S. 566, 573 (1974).

Despite these general principles, courts have repeatedly noted the practical confines of expressing prohibited conduct through statutory language. In Grayned, the Supreme Court noted that because legislative bodies are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." 408 U.S. at 110. Additionally, the Supreme Court has noted that "there are limitations in the English language with respect to being both specific and manageably brief," and therefore a statute is not unconstitutionally vague if it is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 578-79 (1973).

In its consideration of virtually the same issue, the Sixth Circuit has rejected a challenge by an adult bookstore that argued the Act was impermissibly vague. See Richland Bookmart, 137 F.3d at 441. The "adult bookstore" definition states that certain sexually oriented materials, devices, or paraphernalia must be the "*principal or predominant* stock or trade" of the business. Id. (emphasis added); see also Tenn. Code Ann. § 7-51-1101(1). Although the plaintiff, an adult-bookstore operator, claimed that the Act was unconstitutionally vague, the Sixth Circuit refused to accept this interpretation. Specifically, the court found that the plaintiff's establishment "clearly falls within the purview of the statute." Richland Bookmart, 137 F.3d at 411. The court noted that, under Supreme Court authority, it was "unnecessary to consider vagueness when an otherwise valid ordinance undisputedly applies to the plaintiff—when there is no vagueness as to him." Id. (citing American Mini Theatres 427 U.S. at 58-59; Renton, 475 U.S. at 55 n.4).

Additionally, the United States District Court for the Middle District of Tennessee has recently rejected a vagueness challenge to the definitions of "adult cabaret" and "adult establishment" under the Act. Belew, No. 1-01-0139, at 64-68. The Belew court found that the phrases used in the Act are "commonly understood" and that the narrowing construction "specifically limits" the definitions to those in which certain enumerated sexual content is the "principal use" or "principal or predominant theme, emphasis, or portion." Id.; Tenn. Code Ann. §§ 7-51-1101(2), (3).[6] This Court is mindful that a decision from another district court has no precedential value and is not binding on this court. Nonetheless, this Court finds the reasoning in Belew persuasive. In light of Richland Bookmart and the reasoning in Belew, this Court finds that Plaintiffs, who concede to operating erotic dance clubs within Shelby County, do not have a likelihood of success on the merits as to this issue.

B. CITY OF MEMPHIS ORDINANCES

Next, the Court must determine whether any City of Memphis ordinances would prevent the application of the Act to Plaintiffs as operators of adult entertainment establishments within the City of Memphis. Under the Act, "if a city . . . chooses to *enact and enforce its own regulatory scheme for adult-oriented establishments and sexually-oriented businesses*, then the provisions of this

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[6] The Belew court further addressed the phrase "or any other personal service offered customers" in the definition of "adult entertainment" and found that it was not unconstitutionally vague. Belew, No. 1-01-0139, at 66. The Belew court stated that the phrase must be "read in context with the entire definition," id., which requires that the activity have a certain "principal or predominant theme, emphasis," Tenn. Code Ann. § 7-51-1101(3).

part shall not apply within the jurisdiction of such city or other political subdivision." Tenn. Code Ann. § 7-51-1121(b) (emphasis added). Based upon the record before the Court, at least three city ordinances exist that have bearing upon this determination. See Memphis, Tenn. Code § 6-72 (sexually oriented businesses); id. § 7-08 (beer permits); id. § 6-20 (dance hall permits). Despite these ordinances, the Administrator of the City of Memphis Permits Office affirmed that the "City of Memphis currently has no licensing system specifically for operating or being employed at an adult business." Higgens Aff. ¶ 5. Accordingly, the Court will consider the substance of each ordinance to determine whether it would prevent the application of the Act within the City of Memphis.

1. Sexually-Oriented Businesses Ordinance

The Court begins its analysis with the City's ordinance on sexually oriented businesses. See Memphis, Tenn. Code § 6-72. At first glance, this ordinance would appear to be exactly the type of regulatory scheme that would prevent application of the Act in the City. Yet the history and enforcement of this statute significantly complicates the analysis.

In 1995, the constitutionality of Section 6-72, also referred to as Ordinance 4013, was challenged before the United States Courts of Appeals for the Sixth Circuit. See East Brooks Books, 48 F.3d 220. The Sixth Circuit concluded that various portions of Section 6-72 were invalid. Id. at 226-28. On October 21, 1996, this Court entered a Consent Final Judgment adopting the Court of Appeals' decision as the final ruling and judgment in these consolidated cases. As a result, Section 6-72 "*has never been enforced*" in the City of Memphis and "[n]one of the

Plaintiffs in the case at hand have *ever* applied for a permit" under its provisions. Higgens Aff. ¶¶ 3-4 (emphasis added).

In light of evidence in the record that the ordinance has never been enforced, the Court must determine whether the Shelby County ordinance adopting the Act is now applicable in the City of Memphis. It is well-settled that, when interpreting a statute, this Court is to use the ordinary and natural meaning of the language. The Limited, Inc. v. C.I.R., 286 F.3d 324, 332 (6th Cir. 2002) (citations omitted). Under the provisions of the Act, a city must enact *and enforce* its own regulatory scheme for adult-oriented establishments and sexually oriented businesses in order to prevent a county ordinance from being applicable within the city. Tenn. Code Ann. § 7-51-1121(b). In light of the proof in the record that Section 6-72 has never been enforced within the City of Memphis, Plaintiffs have not demonstrated a substantial likelihood of success on the merits as to non-applicability to the City of Memphis.

2. Beer Ordinance

Next, the Court must examine whether the City's beer ordinance, see Memphis, Tenn. Code § 7-08, prevents the application of the Act. This ordinance generally provides for "Licenses to Store, Sell, Distribute, or Manufacture" alcohol. Id. Under Article 2, the ordinance does discuss "prohibited sexual or pornographic conduct" at establishments that distribute alcohol in accordance with the ordinance. See id. § 7-08-090. The ordinance prohibits employees, hosts, or other persons from exposing certain anatomical areas, see id. § 7-08-090(B), and further prohibits various sexual activities from occurring on premises, see id. §§ (C) & (D).

Again, the Court must use the ordinary meaning of a statute's terms to determine the proper construction of the provisions. The Act, as adopted by Shelby County, states that a city must enact and enforce its own regulatory scheme for *adult-oriented establishments and sexually-oriented businesses* in order to avoid the applicability of a county ordinance. This City beer ordinance is not exclusively directed at adult-oriented establishments or sexually oriented businesses. Instead, this ordinance applies to all venues in the City that serve alcohol. Because the ordinance covers the distribution of alcohol at any number of businesses, including restaurants, bars, theaters, sporting venues, and night clubs, it cannot be said that it is a regulatory scheme for adult-oriented establishments and sexually oriented businesses. On the contrary, it is an ordinance for the distribution of alcohol regardless of the setting in which the alcohol is served. As Shelby County notes, merely because adult-oriented establishments may happen to violate the ordinance more often than other establishments does not mean that the ordinance is solely directed at their type of business. If such were the case, a general requirement that any business obtain a general license or permit from the City of Memphis could be considered a regulatory scheme for adult-oriented establishments and sexually oriented businesses. The Court does not find that such laws that regulate a vast number of businesses, including adult establishments, are sufficient to prevent the application of the Act. Accordingly, Plaintiffs have not demonstrated a substantial likelihood of success on the merits on this issue.

With respect to the City of Memphis beer ordinance, Plaintiffs raise another related issue that the Court will briefly address. Specifically, Plaintiffs allege that the Act impermissibly restricts the right of the Memphis Beer

Board to license and permit the sale of beer. Under Tennessee law, the right of a citizen to have a beer permit is based solely upon state statutes. Young v. Warren Cty. Beer Bd., 258 S.W.2d 763, 764 (Tenn. 1953). Furthermore, in a case challenging the validity of the Act, the Tennessee Supreme Court held that "regulation of entertainment provided in establishments licensed to sell alcohol is within the authority of the State." Price v. State, 806 S.W.2d 179, 181 (Tenn. 1991). As the Act is Shelby County's local adoption of a state statute, the Court finds that Plaintiffs have not demonstrated a substantial likelihood of success on the merits as to their claim that the Act impermissibly usurps alcohol licensing authority from the City of Memphis.

3. Dance Hall Permits

Finally, the Court must consider whether the city ordinance regarding dance hall permits is a regulatory scheme for adult-oriented establishments or sexually oriented businesses. See Memphis, Tenn. Code § 6-20. This ordinance governs any business or person who "conducts, manages, maintains or controls, either directly or indirectly any . . . dance to which the public generally gains admission . . . ." Id. § 6-20-1. Thus, this ordinance also governs a variety of nightclubs and other venues. As an example, Coyote Ugly, a traditional bar, has a dance hall permit for its operation despite not presenting exotic dancing or nudity. Higgens Aff. ¶ 7. Additionally, the Court can envision a wide variety of dance clubs and bars that may fall within the ambit of the dance hall ordinance and yet have no relation to adult-oriented establishments or sexually oriented businesses.

Once again, the language of the Act clearly states a county's ordinance should apply absent a city's enactment

and enforcement of a regulatory scheme for adult-oriented establishments or sexually oriented businesses. It is certainly true that the City of Memphis has various ordinances that do generally apply to these establishments along with a variety of other businesses. However, the Court finds that these general provisions are not the type of regulations that prevent the application of the Act.

Accordingly, the Court finds that Plaintiffs have not demonstrated, prima facially, that the City of Memphis has enacted and enforced its own regulatory scheme for adult-oriented and sexually oriented establishments. This conclusion is based upon the Court's analysis of the relevant provisions and is substantially supported by the Administrator of the City of Memphis Permits Office's affidavit that the "City of Memphis currently has no licensing system specifically for operating or being employed at an adult business." See Higgens Aff. ¶ 5. As such, Plaintiffs have not demonstrated a substantial likelihood of success on the merits on this issue.

C. IRREPARABLE HARM AND BALANCING THE INTERESTS OF THE PARTIES

Next the Court will address the issue of irreparable harm. Plaintiffs argue that the violation or denial of one's First Amendment right, even for a moment, constitutes irreparable harm warranting injunctive relief. The Court does not dispute Plaintiffs' premise, but rather finds that Plaintiffs have not demonstrated a basis for relief.

Plaintiffs seek injunctive relief to preserve the status quo thus staying enforcement of the Act until the matter is decided on the merits. The propriety of preliminary injunctions was addressed by the United States Court of Appeals for the Sixth Circuit in Stenberg v. Checker Oil Co.,

573 F.2d 921 (6th Cir. 1978), which explained as follows:

> It must not be thought, however, that there is any particular magic in the phrase "status quo." The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. If [sic] often happens that this purpose is furthered by preservation of the status quo, *but not always*. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties, by the issuance of a mandatory injunction, or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury.

Id. at 925 (emphasis added) (citations omitted).

As to whether Plaintiffs will suffer irreparable harm if an injunction is not issued, the Court finds that this factor does weigh in their favor. Plaintiffs have presented the declarations of Cooper and Westlund, which state that they believe their establishments may suffer adverse impacts if the Act is adopted. Cooper Decl. ¶¶ 10-17; Westlund Decl. ¶¶ 9-15. However, the Court considers this against Plaintiffs failure to demonstrate a likelihood of success on the merits. Because preliminary injunctions are extraordinary remedies, district courts only issue them when necessary. As the Sixth Circuit said in Stenberg, the preliminary injunction was created to "preserve the court's ability to render a meaningful decision on the merits." 573 F.2d at 925. Courts use the concept of irreparable harm to assess their capability of rendering

meaningful decisions on the merits.

Shelby County, preliminarily, has presented evidence of activities by and at Plaintiffs' establishments which threaten public health and safety, and which potentially violate existing laws and ordinances. Thus when balancing the competing interests of the parties, and when considering the likelihood of Plaintiffs being able to demonstrate a constitutional violation, the Court finds that Plaintiffs fail to demonstrate irreparable harm. The denial of a preliminary injunction at this juncture will not impair the Court's ability to ultimately determine the constitutionality of the Act on the merits.

Additionally, when comparing the competing harms, the scales tip in favor of Defendant Shelby County, and the State Intervenor. As demonstrated by the countless studies relied upon in the adoption of the Act, Shelby County seeks to reduce the criminal activity and other adverse societal impacts associated with these establishments. Shelby County, Tenn. Ord. 344. Additionally, the Act provides criminal penalties and fines for violations and provides for the potential suspension or revocation of the license. Tenn. Code Ann. § 7-51-1119. Such stringent penalties have previously not been available within Shelby County to deter the adverse effects. As such, injunctive relief would undoubtedly cause substantial harm to Shelby County if it were not permitted to enact validly promulgated ordinances during the pendency of this litigation.

D. PUBLIC POLICY INTERESTS

As to whether the public interest will be served by an injunction, the Court finds that the evidence provided by Shelby County demonstrates that the Act seeks to

minimize the adverse effects of sexually oriented businesses upon the community without forbidding such sexually candid expression. Thus, the Court finds that this factor weighs in favor of Shelby County.

IV. CONCLUSION

In summary, although Plaintiffs may sustain harm from the adoption of the Act in Shelby County, Plaintiffs have not shown a substantial likelihood of success on the merits. Further, Shelby County would suffer greater harm if it were not able to enforce the Act. Plaintiffs have failed to demonstrate irreparable harm, and finally the public interest is served by minimizing the adverse secondary effects of sexually oriented businesses. Accordingly, the factors weighing against injunctive relief outweigh the potential harm to Plaintiffs. Thus, no injunction should issue.

Based upon the foregoing, the Court finds that injunctive relief is not appropriate in this case. The Court declines to stay the Act as its constitutionality may be fully determined in a trial on the merits. Accordingly, Plaintiffs' Motion for Temporary Injunction is DENIED.

IT IS SO ORDERED this 23rd day of April, 2008.

s/ Bernice B. Donald
BERNICE B. DONALD
UNITED STATES DISTRICT JUDGE

FILED
Mar 02, 2010
LEONARD GREEN, Clerk

No. 08-5494

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ENTERTAINMENT PRODUCTIONS, INC., ET AL.,	)	
	)	
Plaintiffs-Appellants,	)	
v.	)	O R D E R
	)	
SHELBY COUNTY, TENN., ET AL.,	)	
	)	
Defendants-Appellees.	)	
	)	
ROBERT E. COOPER, JR., ATTORNEY GENERAL,	)	
	)	
Intervenor Defendant-Appellee.	)	

BEFORE: BOGGS, MOORE, and SUTTON, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active* judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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*Judge Gibbons recused herself from participation in this ruling.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

U. S. Const., Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const., Amend. XIV

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the

Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Tenn. Code Ann. §7-51-1102.
Part Definitions

. . .

(2) "Adult cabaret" means an establishment that features as a principal use of its business, entertainers, waiters, or bartenders who expose to public view of the patrons within such establishment, at any time, the bare female breast below a point immediately above the top of the areola, human genitals, pubic region, or buttocks, even if partially covered by opaque material or completely covered by translucent material, including swim suits, lingerie, or latex covering. "Adult cabaret" includes a commercial establishment that features entertainment of an erotic nature, including exotic dancers, strippers, male or female impersonators, or similar entertainers;

(3) "Adult entertainment" means any exhibition of any adult-oriented motion picture, live performance, display or dance of any type, that has as a principal or predominant theme, emphasis, or portion of such performance, any actual or simulated performance of specified sexual activities or exhibition and viewing of specified anatomical areas, removal of articles of clothing or appearing unclothed, pantomime, modeling, or any other personal service offered customers;

. . .

(6) "Adult-oriented establishment" includes, but is not limited to, an adult bookstore, adult motion picture theater, adult mini-motion picture establishment, adult cabaret, escort agency, sexual encounter center, massage parlor, rap parlor, sauna; further, "adult-oriented establishment" means any premises to which the public

patrons or members are invited or admitted and that are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises for the purpose of viewing adult-oriented motion pictures, or wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, when such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect. "Adult-oriented establishment" further includes, without being limited to, any adult entertainment studio or any premises that is physically arranged and used as such, whether advertised or represented as an adult entertainment studio, rap studio, exotic dance studio, encounter studio, sensitivity studio, model studio, escort service, escort or any other term of like import;

. . .

(24) "Specified anatomical areas" means:

(A) Less than completely and opaquely covered:

(i) Human genitals;

(ii) Pubic region;

(iii) Buttocks; and

(iv) Female breasts below a point immediately above the top of the areola; and

(B) Human male genitals in a discernibly turgid state, even if completely opaquely covered;

. . .

(27) "Specified sexual activities" means:

(A) Human genitals in a state of sexual stimulation or arousal;

(B) Acts of human masturbation, sexual intercourse or sodomy; or

(C) Fondling or erotic touching of human genitals, pubic region, buttocks or female breasts.

[Acts 1987, ch. 432, § 2; 1998, ch. 1090, § 1; 2003, ch. 47, § 1; 2003, ch. 90, § 2; 2005, ch. 79, § 1; 2006, ch. 943, §§ 1, 2; 2008, ch. 1085, § 1.]

Tenn. Code Ann. §7-51-1109
Revocation, suspension or annulment of licenses

(a) The board shall revoke, suspend or annul a license or permit for any of the following reasons:

. . .

(5) Any intoxicating liquor or malt beverage is served or consumed on the premises of the adult-oriented establishment, when an operator, employee, entertainer, or escort knew, or should have known, of the violation and authorized, approved, or, in the exercise of due diligence, failed to take reasonable efforts to prevent the violation;

. . .

[Acts 1987, ch. 432, § 9; 1998, ch. 1090, § 1; 2001, ch. 183, § 5; 2003, ch. 90, § 2; 2006, ch. 943, §§ 4-9; 2008, ch. 1085, §§ 2, 3.]

Tenn. Code Ann. §7-51-1114
Prohibited activities

(a) No operator, entertainer or employee of an adult-oriented establishment establishment, either on the premises or in relation to the person's role as an operator, entertainer, or employee of an adult-oriented establishment, shall permit to be performed, offer to perform, perform, or allow patrons to perform sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia.

(b) No operator, entertainer or employee of an adult-oriented establishment shall encourage or permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any operator, entertainer or employee.

(c) No entertainer, employee, or customer shall be permitted to have any physical contact with any other on the premises during any performance and all performances shall only occur upon a stage at least eighteen inches (18") above the immediate floor level and removed at least six feet (6') from the nearest entertainer, employee, or customer.

(d) (1) No employee or entertainer, while on the premises of an adult-oriented establishment, may:

(A) Engage in sexual intercourse;

(B) Engage in deviant sexual conduct;

(C) Appear in a state of nudity; or

(1) Fondle such person's own genitals or those of another.

(2) For the purpose of this section, "nudity" means the showing of the human male or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

(e) If the license holder operates an escort bureau, such bureau shall not be operated as a sexually-oriented escort bureau as defined in this part.

(f) No permit holder of an escort bureau shall conduct oneself as a sexually-oriented escort as defined in this part.

(g) No license holder shall advertise that such license holder offers sexual stimulation or sexual gratification as defined in this part.

[Acts 1987, ch. 432, § 14; 1998, ch. 1090, § 1; 2001, ch. 183, § 12.]

Item# 14 Prepared by Robert B Rolwing

Commissioner MULROY Approved by _____

ORDINANCE NO 344

AN ORDINANCE REPEALING ORDINANCE NO. 81 RELATIVE TO REGULATING AND LICENSING SEXUALLY ORIENTED BUSINESSES, AND ADOPTING THE STATE ADULT-ORIENTED ESTABLISHMENT REGISTRATION ACT OF 1998 IN SHELBY COUNTY

WHEREAS, Tennessee Code Annotated, Sections 7-51-1101, et seq, the Adult-Oriented Establishment Registration Act of 1998, provides a method of regulating sexually-oriented businesses to address their deleterious secondary effects without regard to the content of speech, and

WHEREAS, The validity and constitutionality of that law has been affirmed by the Tennessee Court of Appeals in *American Show Bar Series, Inc v Sullivan County*, 30 S W 3d 324 (2000), *permission to appeal to the Supreme Court denied*, and by the United States District Court for the Western District of Tennessee, and on appeal by the Sixth United States Circuit Court of Appeals in *Odle v Decatur County*, 421 F 3d 386 (6th Cir 2005), and similar provisions have been approved in numerous other court opinions throughout the nation, and

WHEREAS, That law corrects the deficiency of Ordinance No 81 (November 5, 1990), as ruled in *Cooper d/b/a Night Moves, Inc v A C Gilless, et al*, Circuit Court

No 64967-2 (1996), and detailed further as to the companion Memphis City Ordinance No 4013 in *East Brooks Books, Inc v City of Memphis*, 48 F 3d 220 (6th Cir 1995), *rehearing denied, certiorari denied* 516 U S 909, 116 S Ct 277, 133 L Ed 2d 198 (1995)(No 95-203), and is in accordance with the law as it has subsequently developed, as particularly detailed In *City of Littleton v Z J Gifts D-4, L L C* , 541 U S 774, 124 S Ct 2219, 159 L Ed 2d 84 (2004), and

WHEREAS, This Board of County Commissioners has had the opportunity to review a report concerning the Location and Land Use of Identified Sexually Oriented Businesses in Memphis, and

WHEREAS, This Board of County Commissioners has had the opportunity to review a report of the *Geospatial Analysis of Crime Incidents and Arrests Around Sexually Oriented Businesses* - May 2004 by the University of Memphis Center for Community Criminology and Research, and

WHEREAS, This Board of County Commissioners has had the opportunity to review a report entitled *Best Practice Number 15 Examining the Impact of Sexually Oriented Businesses on Crime in Memphis, Tennessee*, a report of the Memphis Shelby Crime Commission, and

WHEREAS, This Board of County Commissioners has had the opportunity to review a report entitled *Regulating Adult Oriented Establishments,* December 11, 2006, Report of Duncan Associates for the Memphis Shelby Crime Commission, Office of Planning and Development, and

WHEREAS, This Board of County Commissioners has

had the opportunity to review a report entitled *Addendum to Best Practice 15*, dated sometime in 2007, and

WHEREAS, This Board of County Commissioners has had the opportunity to review a letter summary of illegal activity dated March 12, 2007, from the Honorable William L. Gibbons, District Attorney General, and

WHEREAS, This Board of County Commissioners has had the opportunity to review the *Memphis Alcohol Commission and Adult Entertainment Report* of April 2007 by the Memphis and Shelby County Division of Planning and Development, and

WHEREAS, This Board of County Commissioners has had the opportunity to review other reports documenting the negative secondary effects of adult businesses, including a report summarizing the citations issued and disposed of from January 2000 - April 2007 for violations of Memphis City Code, Section 4-82, Prohibited Sexual or Pornographic Conduct, prepared May 7, 2007, by Wanda Corcoran, Chief Deputy of the Memphis City Court Clerk's Office, virtually all of which citations were issued in Memphis adult cabarets, and

WHEREAS, This Board of County Commissioners has had the opportunity to review a report regarding the adverse health effects of activity commonly occurring in adult bookstores, and

WHEREAS, This Board of County Commissioners adopts the findings of those reports and likewise follows and adopts the state legislature's findings in enacting the law, at 1998 *Tennessee Public Acts*, chapter 1090 and amendments, and in particular in the most recent amendments to that law at 2006 *Tennessee Public Acts*,

chapter 943, wherein the legislature found the law to be a reasonable time, place, and manner regulation to attempt to address some recognized deleterious secondary effects commonly associated with adult-oriented establishments, including but not limited to an increase in crime, the spread of sexually transmitted diseases, the downgrading of property values, and other public health, safety, and welfare issues, and

WHEREAS, This Board of County Commissioners finds that each of the foregoing negative secondary effects constitutes a harm that the County has a substantial government interest in preventing and/or abating This substantial government interest in preventing adverse secondary effects, which is the rationale for regulating adult-oriented businesses, exists independent of any comparative analysis between adult-oriented and non-adult-oriented businesses. Additionally, the interest in regulating adult-oriented businesses extends to preventing future secondary effects of adult-oriented businesses currently operating in Shelby County as well as future adult-oriented businesses that may locate in Shelby County. The Board of County Commissioners finds that the cases and documentation referenced herein are reasonably believed to be relevant to such secondary effects

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF SHELBY COUNTY, TENNESSEE, That Shelby County Ordinance No 81, entitled an Ordinance of the County of Shelby Regulating and Licensing Sexually Oriented Businesses, encoded at Shelby County Code, Sections 7-346, et seq, is hereby repealed

BE IT FURTHER ORDAINED, That the Adult-

Oriented Establishment Registration Act of 1998, encoded at Tennessee Code Annotated, Sections 7-51-1101, et seq, and as it may be amended from time to time by the state legislature, is effective in Shelby County according to the terms of this ordinance

BE IT FURTHER ORDAINED, That pursuant to Tennessee Code Annotated, §7 51-1112, the various municipal police departments are authorized to enforce this law within the jurisdictions to the same extent as the Shelby County Sheriff

BE IT FURTHER ORDAINED, That the various sections of this Ordinance are severable, and that any portion declared unlawful shall not affect the remaining portions

BE IT FURTHER ORDAINED, That this Ordinance shall become effective January 1, 2008

/s/ David Lillard
David Lillard
Chairman of County Commission

/s/ A C Wharton, Jr
A C Wharton, Jr
County Mayor

Date 9/13/07

ATTEST

/s/ Evelyn Guy
Deputy Clerk of County Commission

FIRST READING JULY 9 2007

SECOND READING JULY 23, 2007

ADOPTED
THIRD READING SEPTEMBER 10,2007

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In The

Supreme Court of the United States

ENTERTAINMENT PRODUCTIONS, INC., *et al.*,

Petitioners,

v.

SHELBY COUNTY, TENNESSEE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the lower courts erred by narrowly constructing Tennessee's Adult-oriented Establishment Registration Act of 1998, Tenn. Code Ann. § 7-51-1101, *et seq.* ("the Act"), in a manner to which it is readily susceptible and upholding it by finding no real or substantial overbreadth in regard to its legitimate scope.

(2) Whether the lower courts erred in applying the intermediate scrutiny test, including the requirements of *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986) and *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002), to uphold the constitutionality of the Act, which addresses deleterious secondary effects of "adult-oriented establishments," by finding that the Act provides a reasonable opportunity to open and operate "adult-oriented establishments."

LIST OF THE PARTIES

Petitioners, who were party plaintiffs-appellants to the proceedings in the lower courts, are: Entertainment Productions, Inc., a Tennessee corporation, d/b/a Christie's Cabaret; Platinum Rose, Inc., a Tennessee corporation, d/b/a Platinum Rose; 777 Memphis, Inc., a Tennessee corporation, d/b/a The Gold Club; Manhattan, Inc., a Tennessee corporation, d/b/a New York, New York; Tennessee Entertainment Concepts, Inc., a Tennessee corporation, d/b/a The Pony; 2882 Lambs Place, L.L.C., a Tennessee Limited Liability Company, d/b/a The Jet Strip; and 600 Marshall Entertainment Concepts, L.L.C., a Tennessee Limited Liability Company, d/b/a Downtown Dolls. Respondents, who were party defendants-appellees to the proceedings in the lower courts, are: Shelby County, a political subdivision of the State of Tennessee; the City of Memphis, Tennessee; and Robert E. Cooper, Jr., Intervenor, in his official capacity as Attorney General and Reporter for the State of Tennessee.

CORPORATE DISCLOSURE STATEMENT

Because the Respondents are governmental entities or an official, no corporate disclosure statement is needed.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Shelby County, Tennessee, and the City of Memphis, Tennessee, and Intervenor/Respondent Tennessee Attorney General and Reporter Robert E. Cooper, Jr., pursuant to Sup. Ct. R. 15, hereby oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's Order denying Petitioners' Petition for Rehearing and Rehearing En Banc is set forth at the Petition Appendix ("Pet. App.") 78-79.

The Sixth Circuit's decision is reported at *Entertainment Productions, Inc., v. Shelby County, Tenn.*, 588 F.3d 372 (6th Cir. 2009). (Pet. App. 1-42).

The district court's decision is reported at *Entertainment Productions v. Shelby County, Tenn.*, 545 F.Supp.2d 734 (W.D. Tenn. 2008). (Pet. App. 46-77).

JURISDICTION

The decision of the Sixth Circuit was entered on November 25, 2009, and the Petitioners' Petition for Rehearing and Rehearing En Banc was denied on March 10, 2010. The Petitioners' Petition for a Writ of

Certiorari was timely filed within ninety days of the order denying rehearing. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The First and Fourteenth Amendments to the United States Constitution are set forth at Pet. App. 80-82. Tenn. Code Ann. §§ 7-51-1102(2),(3),(6),(24), and (27), 7-51-1109(a)(5), and 7-51-1114, are set forth at Pet. App. 83-88. Tenn. Code Ann. §§ 7-51-1109(a)(5) and 7-51-1113 are set forth in Response Appendix ("Resp. App.") hereto at 1-3. Shelby County, Tennessee County Ordinance 344 is set forth at Pet. App. 89-94.

STATEMENT OF THE CASE

Petitioners operate "adult cabarets," which are "adult-oriented establishments," wherein traditional nude and semi-nude adult entertainment is presented. (*Entertainment Productions v. Shelby County*, Case No. 2:08-CV-02047-BBD-tmp (W.D. Tenn.), Complaint, R.1, ¶s 4-9). Tennessee's Adult-oriented Establishment Registration Act of 1998, Tenn. Code Ann. §§ 7-51-1101, *et seq.* ("the Act") utilizes licensing and other reasonable regulations of adult-oriented establishments in order to address deleterious secondary effects, such as crime (particularly prostitution and

illegal drug sales or usage), public health concerns (especially regarding sexually transmitted diseases), decreased property values, and other adverse social impacts. When the Act was adopted for local application within Shelby County in 2007, Petitioners facially challenged the constitutional validity of the Act, seeking a blanket injunction prohibiting any enforcement of the Act.

Following a hearing conducted on April 11, 2008, the district court denied Petitioners' motion for preliminary injunction. In denying the motion and finding that Petitioners had failed to establish a substantial likelihood of success on the merits of any of their constitutional claims, the court did not reference or accredit the opinion-type testimony of Petitioners' Fed. R. Evid. 26 witness, Judith Lynn Hanna, Ph.D., a cultural anthropologist. The district court applied a narrowing construction from the text of the Act and found no real and substantial overbreadth. (Pet. App. 59-67).

Moreover, the district court found that "Shelby County, preliminarily, has presented evidence of activities by and at [Petitioners'] establishments which threaten public health and safety, and which potentially violate existing laws and ordinances." (Pet. App. 76). Shelby County presented evidence showing prostitution, drugs sales and usage, and other related criminal activity associated with

Petitioners' establishments.[1] While deprivation of First Amendment freedoms may constitute irreparable harm, "society's interest in protecting [erotic expression] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 294 (2000). The district court concluded that, in balancing competing harms, the Government's desire to reduce criminal activity and other adverse societal impact associated with adult-oriented establishments weighs in favor of denying the injunctive relief. (Pet. App. 74-77).

The Sixth Circuit Court of Appeals affirmed that the district court did not abuse its discretion in denying Petitioners' motion for preliminary injunction, finding in part no likelihood of success on their claims that the Act is unconstitutional.[2] The Sixth

[1] A police vice officer testified that at the establishment of the one petitioner, "Downtown Dolls," who claims to be a "bikini bar," that the entertainers regularly removed their tops or moved their bottom clothing aside to reveal their genitalia. *Entertainment Productions v. Shelby County*, Case No. 2:08-CV-02047-BBD-tmp (W.D. Tenn.), Transcript of April 11, 2008, Hearing Proceedings, pp. 106-11.

[2] On September 29, 2009, prior to the Sixth Circuit decision, the district court granted Respondents' motions for summary judgment on all counts of Petitioners' complaint, except the count alleging overbreadth if the Act is applied to "bikini bars." This single issue remains for further hearing or trial. (*Entertainment Productions v. Shelby County*, Case No. 2:08-CV-02047-BBD-tmp (W.D. Tenn.), "Order Granting In Part and Denying In Part Defendants' Motions For Summary Judgment," Doc. #123).

Circuit rejected Petitioners' expansive reading of the Act and, through application of a narrowing construction of the Act's text, found that no real and substantial overbreadth in regard to the legitimate scope of the Act had been shown. (Pet. App. 7-42). Petitioners' claim that the Act's requirements will result in an unconstitutional reduction in the "quantity and accessibility of speech" was also rejected. (Pet. App. 42; *see also* Pet. App. 54-58).

In denying the extraordinary remedy of a blanket preliminary injunction, the lower courts considered the traditional four factors: (1) whether the plaintiff demonstrated a substantial likelihood of success on the merits; (2) whether the plaintiff will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction will cause substantial harm to others if issued; and (4) whether the public interest is served by issuance of the injunction. *City of Littleton v. J.Z. Gifts D-4, L.L.C.*, 541 U.S. 774, 784 (2004) (Pet. App. 5 & 48-49).

OVERVIEW OF THE ACT

A. The Act Is A Time, Place, And Manner Regulation Addressing Deleterious Secondary Effects Of Adult-oriented Establishments, Which Is Subject To Intermediate Scrutiny For Validity Under The First Amendment.

The lower courts applied the correct legal principle that this Court treats laws, like the Act,

that intend to combat deleterious secondary effects as being content neutral and appropriately subject to the intermediate scrutiny standard. (*See* Pet. App. 5-8; Pet. App. 49-52). "[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny" – a principle first enunciated by this Court in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). To withstand constitutional scrutiny, (1) the [Act or] Ordinance must have been enacted within [the Government's] constitutional power; (2) the [Act or] Ordinance must further a substantial governmental interest; (3) the interest must be unrelated to the suppression of speech; and (4) the [Act or] Ordinance may pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *Id.* Restrictions on sexually explicit expression are valid under the First Amendment if they are intended to ameliorate adverse secondary effects of such expression, they further a substantial government interest unrelated to the suppression of free speech, they are narrowly tailored, and they "do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986) (upholding zoning ordinance restricting location of sexually-oriented establishments).

The intermediate scrutiny test has been applied to uphold regulations similar to the Act's anti-nudity provision in Tenn. Code Ann. § 7-51-1114(d)(1)(C), which essentially requires entertainers in adult-oriented establishments to wear at least pasties and

g-strings. The *O'Brien* intermediate scrutiny test was applied by this Court to reject a challenge to the constitutionality of Indiana's public indecency statute, which likewise had the effect of requiring dancers at adult-oriented establishments to wear pasties and a g-string. *See Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991). In his concurring opinion in *Barnes*, Justice Souter pointed to "the state's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified [in that case]." *Id.* at 582 (Souter, J., concurring). The "secondary effects" analysis and the *O'Brien* test were applied by the plurality in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289-302 (2000) (O'Connor, J.), to reverse a ruling by the Pennsylvania Supreme Court that a City of Erie Public Indecency Ordinance (which has the effect of requiring exotic dancers to wear pasties and g-strings) is constitutionally invalid under the First Amendment.

> Being "in a state of nudity" is not an inherently expressive condition. . . . [H]owever, nude dancing of the type at issue here is expressive conduct, although we think *it falls within the outer ambit of the First Amendment's protection.*

Id. at 289 (emphasis added). "[T]he State's interest in preventing secondary effects [of public nudity and adult-oriented establishments] is not related to the suppression of expression." *Id.* This Court noted that "crime and other public health and safety problems

are caused by the presence of nude dancing establishments." *Id.* at 300.

This Court again applied the intermediate scrutiny test in overturning a Ninth Circuit decision invalidating on summary judgment a City of Los Angeles zoning provision prohibiting two adult uses per authorized location, which effectively would require the separation of adult book/video stores from on-premises viewing arcades. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). In *Alameda Books*, this Court did not abandon the intermediate scrutiny test, set forth in *Renton*, 475 U.S. at 46-50, for analyzing the constitutionality of time, place, and manner regulations designed to address deleterious secondary effects. This Court continues to adhere to the principle enunciated in *Renton* that a governmental regulation, like the Act, will be upheld as long as it is shown to be designed to serve a substantial government interest (reducing secondary effects) and that reasonable alternative avenues of communication remain available. 475 U.S. at 50.

B. The Act's Provisions Are Severable.

Even if overbreadth could be demonstrated by Petitioners, the Act's severability feature should operate to save the Act from a blanket injunction or invalidation. The Act, when enacted as 1998 Tenn. Pub. Acts Ch. 1090, as well as its amendments in 2001 and 2006, contained severability clauses.

Moreover, upon codification in the Tennessee Code, Tenn. Code Ann. § 1-3-110 provides for severability and elision of any specific clause, sentence, part, or section of the Code that may be found by a court to be constitutionally invalid. Therefore, should a court find that a particular clause, or provision of the Act may warrant declaratory or other relief, the relief should be limited to eliding that individual clause or section, whenever possible.

C. The Act Has Been Upheld By Tennessee And Lower Federal Courts As Constitutionally Valid.

The lower courts' rejection of this facial challenge comports with Tennessee's trial and appellate court holdings that the Act is constitutionally valid. (*See* Pet. App. 33; Pet. App. 51-52, 56-58). The Tennessee Court of Appeals rejected claims that the Act violates the free speech provisions of the United States and Tennessee Constitutions, or that certain provisions of the Act are allegedly constitutionally void for vagueness and overbreadth. *American Show Bar Series, Inc., d/b/a Show Palace v. Sullivan County, Tennessee*, 30 S.W.3d 324 (Tenn. Ct. App. 2000), *perm. app. denied* (Tenn. 2000). The state court affirmed the application of the intermediate scrutiny four-part test, as set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), to find the licensing and regulatory provisions of the Act to be constitutionally valid under the First Amendment and the Tennessee Constitution. *Id.* at 333-40. The court also rejected

claims that the Act's definitional sections are unconstitutionally vague and overbroad. The no-touching, six-foot buffer, and no-nudity requirements were deemed constitutional. *Id.* at 338-40 (citing appropriate federal law). The plaintiff strip clubs were found to have no vested property right under Tennessee law to sell alcoholic beverages, and the court concluded that the police power of the state allows the prohibition of alcoholic beverages in inappropriate venues. *Id.* at 330-33, 337. The Tennessee courts correctly applied the proper test for constitutionality, as set forth by this Court.

Moreover, the Act has also been upheld by the lower federal courts in Tennessee. *See, e.g., Herbert L. Odle, d/b/a Sports Club, Inc. v. Decatur County, Tenn.*, No. 02-1278 (W.D. Tenn., Oct. 14, 2003) (Order granting Summary Judgment); *aff'd in part*, 421 F.3d 386, 387-92 (6th Cir. 2005) (upholding the Act while enjoining a general applicability local ordinance as overbroad); *Angela Kaye Belew v. Giles County Adult-Oriented Establishment Board*, No. 1-01-0139 (M.D. Tenn., Sept. 30, 2005); *Paul Friedman v. Giles County Adult-Oriented Establishment Board*, No. 1-00-0065 (M.D. Tenn., Sept. 29, 2005) (applying a narrowing construction in rejecting challenges that the Act is unconstitutionally vague or overbroad) (cited at Pet. App. 28; Pet. App. 66 & 69). Neither of these courts adopted the expansive interpretation of the Act asserted here by Petitioners.

D. The Act Is Patterned After A Long-standing Local Ordinance, Which Was Deemed Constitutional By The Lower Courts And Has Not Been Interpreted And Enforced In The Broad Manner Asserted By Petitioners.

The text of the Act, as well as the legislative history, demonstrates that the Act is patterned after or copies the provisions of the Chattanooga City Ordinance regulating adult-oriented establishments, which was initially enacted in the mid-1980s. These similar provisions of the Chattanooga City Ordinance were found to be constitutionally valid in the face of a variety ("shotgun approach") of challenges to virtually the entire ordinance. *See D.L.S., Inc. v. City of Chattanooga*, 894 F.Supp. 1140 (E.D. Tenn. 1995), *aff'd*, 107 F.3d 403 (6th Cir. 1997); *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486 (E.D. Tenn. 1986). Vagueness and overbreadth challenges to the similar definitions and provisions of the Chattanooga ordinance were rejected. *Broadway Books*, 642 F.Supp. at 490, n.2; *D.L.S., Inc.*, 894 F.Supp. at 1147. There is no showing that either the Chattanooga Ordinance or the Act has been interpreted in the expansive manner asserted by Petitioners so as to encompass mainstream entertainment and venues.

E. The Act Is Not "Model" Legislation.

There is no showing that the Act's definitional language at issue in this case has been addressed by any other circuit court. The Tennessee Act is not "model" legislation, and there is no showing that the

Act's express language has been utilized or followed in other states. Accordingly, Petitioners parsing over specific language, such as the distinction between the phrase "features as *a* principal use" and the phrase "features as *the* principal use" in the Act's definition of "adult cabaret" and the inclusion of an ungrammatical comma in one clause of the Act's definition of "adult-oriented establishment," does not present circuit conflicts or an important issue of law that this Court needs to settle.

REASONS FOR DENYING THE PETITION

The Sixth Circuit correctly concluded that the district court did not abuse its discretion in denying a blanket preliminary injunction prohibiting blanket enforcement of the Act. No substantial precedential or circuit conflict exists nor is a question of exceptional importance presented, therefore the Petition for a Writ of Certiorari should not be granted.

A. The Lower Courts' Findings That There Is No "Real" And "Substantial" Overbreadth In Relation To The Act's "Plainly Legitimate Sweep," Based In Part Upon Application Of A Narrowing Construction, Comports With Precedent Of This Court.

The Act, both facially and in its legislative history, establishes that it is enacted to address deleterious secondary effects commonly associated with adult-oriented establishments. The Act has

never been applied in the expansive manner asserted by Petitioners, an interpretation that they contend makes the Act unconstitutionally overbroad. Petitioners' nude and semi-nude adult-entertainment performances clearly fall within even the narrowed scope of the Act, and, as the Government's proof at the preliminary injunction hearing showed, Petitioners' establishments are actually associated with deleterious secondary effects, particularly crime (i.e., prostitution and drug possession/transactions). *Entertainment Productions v. Shelby County*, Case No. 2:08-CV-02047-BBD-tmp (W.D. Tenn.) (Transcript of April 11, 2008, Hearing Proceeding, pp. 106-11, 115-23).

The Sixth Circuit (Pet. App. at 7-11, 23-4) and the district court (Pet. App. at 59-67) applied the appropriate law regarding the overbreadth doctrine. Normally, a facial challenge to a legislative act is the most difficult challenge to successfully mount because the plaintiff must establish that no set of circumstances exists under which the act would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). However, under the overbreadth doctrine, when a regulation is not directed at the ultimate right of a person to present or procure protected expression, but instead regulates the manner of presentation, conduct plus speech is involved. When a regulation of conduct plus speech is at issue, the overbreadth must be "real" and "substantial" in relation to the statute's "plainly legitimate sweep" before the law should be invalidated on its face, and if an ambiguous term has created a constitutional

problem which may be solved by construction, courts have a duty to do so. *New York v. Ferber*, 458 U.S. 747, 770 (1982).[3] This Court has reiterated that the overbreadth doctrine is "strong medicine" and has employed it with hesitation and only as a last resort. *Id.* at 769; *see Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Consequently, because overbreadth in the First Amendment area may prohibit a state from enforcing a statute against conduct that is unquestionably within its power to proscribe, this Court has insisted that the overbreadth involved must be

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[3] In *Ferber*, this Court refused to find substantially overbroad a state statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material that depicted such a performance. *Id.*, 458 U.S. at 773-774. This Court, in reversing a finding of unconstitutional overbreadth, noted that the state appellate courts were understandably concerned that this statute directed at child pornography may implicate some protected expression "ranging from medical text books to pictorials in National Geographic." *Id.*

> Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the reach of this statute. Nor would we assume that the [state] courts would widen the possibly invalid reach of the statute by giving an expansive construction to [its proscription]. . . . Under these circumstances [the act] is 'not substantially overbroad and . . . whatever overbreadth may exist, should be cured through case-by-case analysis of the fact situation to which it sanctions allegedly, may not be applied.'

Id. (citations omitted).

"substantial" and "real" before the statute involved may be invalidated on its face. *Ferber*, 458 U.S. at 769-70.[4] Accordingly, if the statute is "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld. *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 397 (1988).

The foregoing principles regarding the overbreadth doctrine were not abandoned in *United States v. Stevens*, ___ U.S. ___, 130 S.Ct. 1577, 78 USLW 4267 (2010), in which this Court upheld a finding that a federal statute prohibiting depictions of animal cruelty was facially invalid under the First Amendment, by deeming it to be substantially overbroad. In *Stevens*, it was not seriously disputed that

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[4] [T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law – particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Broedrick*, 413 U.S. at 615. For there are substantial social costs created by the overbreadth doctrine when it blocks application of the law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To insure that these costs do not swallow the social benefits of declaring a law overbroad, [the Court has] insisted that a law's application to protect its speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications ... before applying the strong medicine of overbreath invalidation." *Id.* at 613

Virginia v. Hicks, 539 U.S. 113, 119-20 (2003)

the presumptively impermissible applications of the federal law far outnumbered any permissible ones. This Court rejected the Government's assurance that it would not enforce the law except for depictions of "extreme" cruelty, which was not an interpretation in keeping with the text of that law. *Id.* at 1591. This Court found that to read that law "as the Government desires requires rewriting, not just reinterpretation." *Id.* at 1592. The law in *Stevens* also subjected persons to compliance with a "bewildering maze of regulations from at least 56 separate jurisdictions," a situation not present with Tennessee's Act. *Id.* at 1589.

By contrast, rather than reading the definitions and restrictions in the Act in their broadest possible sense (as do Petitioners), the lower courts appropriately applied a plausible limiting construction to interpret the provisions realistically to effectuate the purposes of the Act.[5] (*See, e.g., Richland Bookmart v. Nichols*, 137 F.3d 435, 441 (6th Cir. 1998) (same approach used in upholding substantially similar definitions in Tennessee's Adult-oriented Establishment Act of 1995, Tenn. Code Ann. §§ 7-51-1401, *et seq.*). The lower courts set forth the correct legal principles of law regarding the overbreadth doctrine; Petitioners' real assertion is that the lower courts

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[5] The Sixth Circuit correctly noted that the "first step in overbreadth analysis is to construe the challenged statute, it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." (Pet. App. 12) (quoting *Williams*, 128 U.S. at 1838).

misapplied those principles of law, which is rarely a basis for granting certiorari review. Sup. Ct. R. 10.

An "adult cabaret,"[6] which is an "adult-oriented establishment" subject to licensing and regulation under the Act, does not encompass a real and substantial amount of mainstream venues not associated with secondary effects. (Pet. App. 12-17). The Sixth Circuit correctly concluded that there is no constitutional significance in terms of overbreadth to the use of "features as *a* principal use" rather than "features as *the* principal use" in the first clause setting forth the meaning of "adult cabaret." (Pet. App. 13-15) (emphasis added).

> [T]he chosen article is not the only or overriding signal of a statute's meaning. In this case, the common definition of the succeeding term ("principal") diminishes the significance of the indeterminate article. As

[6] Tenn. Code Ann. § 7-51-1102(2) specifies:

> "Adult cabaret" means an establishment that features as a principal use of its business, entertainers, waiters, or bartenders who expose to public view of the patrons within such establishment, at any time, the bare female breast below a point immediately above the top of the areola, human genitals, pubic region, or buttocks, even if partially covered by opaque material or completely covered by translucent material, including swim suits, lingerie, or latex covering. "Adult cabaret" includes a commercial establishment that features entertainment of an erotic nature, including exotic dancers, strippers, male or female impersonators, or similar entertainers[.]

> the district court noted, "principal" means "most important, consequential, or influential." (quoting *Webster's Third New International Dictionary* 1802 (3d ed.1993) (emphasis added)). In light of this definition, the substantive import of the alleged distinction between "the most important" and "a most important" use of a business is negligible.

(Pet. App. 13). Moreover, the Sixth Circuit logically concluded that "[a] 'run' of a [mainstream] performance, however long, that contains nudity, does not transform such a [mainstream] venue into an adult cabaret because no specific play, opera or ballet is commonly deemed to be 'a principal use' of a venue." (Pet. App. 14). Further, the Sixth Circuit concluded that:

> With regard to establishments that are devoted to multiple uses of equal importance, one of which is admittedly adult entertainment, their inclusion under the Act's regulatory scheme would not violate the First Amendment. Neither this court nor the Supreme Court has required that regulatory efforts to address secondary effects of sexually oriented businesses must be confined to establishments that accord unequivocal priority to adult entertainment over all other business uses.

(Pet. App. 14)

From a natural reading of the second clause of what the term "adult cabaret" "includes," the Sixth Circuit, like the district court, found:

> Read naturally, a "commercial establishment that features entertainment of an erotic nature" by any of the listed performers is an "adult cabaret" under the Act only if entertainment by these performers is a principal use of the business and if their attire exposes the anatomical areas specified in the first sentence. Read in this manner, the Act does not burden a substantial amount of protected expression unrelated to secondary effects.

(Pet. App. 15-16). The conclusion that the sorts of entertainment listed in the second sentence exemplifies rather than augments the first sentence of "adult cabaret" in Tenn. Code Ann. § 7-51-1102(2) involves a natural interpretation, not a rewriting, of the Act. Accordingly the Sixth Circuit's conclusion that no real and substantial overbreadth has been demonstrated in regard to the narrowly interpreted term "adult cabaret" is not erroneous and does not warrant this Court's review. (Pet. App. 12-17).

Applying the plausible narrowing construction asserted by the government respondents regarding the term "adult-oriented establishment,"[7] the lower

[7] "Adult-oriented establishment" is tri-partite definition.

> "Adult-oriented establishment" includes, but is not limited to, an adult bookstore, adult motion picture theater, adult mini-motion picture establishment, adult cabaret, escort agency, sexual encounter center, massage parlor, rap parlor, sauna;

(Continued on following page)

courts rejected Petitioners' expansive interpretation of the Act as its only plausible reading. (Pet. App. 17-29).

> We find that the Tennessee Act is readily susceptible to a narrowing construction that would clearly except mainstream artistic venues from the licensing and regulatory scheme. Because we find it improbable that any performances of serious artistic value qualifying as "adult entertainment" would be staged in individualized booths, the number of ostensibly impermissible applications of the Act is negligible and does not rise to the level of real and substantial overbreadth.

(Pet. App. 29).

> further, "adult-oriented establishment" means any premises to which the public patrons or members are invited or admitted and that are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises for the purpose of viewing adult-oriented motion pictures, or wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, when such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect.
>
> "Adult-oriented establishment" further includes, without being limited to, any adult entertainment studio or any premises that is physically arranged and used as such, whether advertised or represented as an adult entertainment studio, rap studio, exotic dance studio, encounter studio, sensitivity studio, model studio, escort service, escort or any other term of like import[.]

Tenn. Code Ann. § 7-51-1102(6) (line breaks added).

Petitioners' expansive reading of the Act also focused upon the possibly ungrammatical placement of a comma in the second section of the "further . . . mean[ing]" of "adult-oriented establishment." The Sixth Circuit agreed that this provision in Tenn. Code Ann. § 7-51-1102(6) should be interpreted, as asserted by Respondents, to mean:

> Further, "adult-oriented establishment" means [1] any premises to which the public patrons or members are invited or admitted and that are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises
>
> [2A] for the purpose of viewing adult-oriented motion pictures,
>
> or [2B] wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, when such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect.

(Pet. App. 24-25). Accordingly, the Sixth Circuit concluded:

> That is, providing "adult entertainment" [2B] will only make an establishment "adult-oriented" if entertainment is conducted in some kind of compartments separated from the common area [1]. This reading considerably reduces, if not completely eliminates, the alleged regulatory burden on

> mainstream artistic performances, since such are not commonly conducted on premises with the specified interior arrangement.

(Pet. App. 25). This interpretation of the Act's definition of "adult-oriented establishment" is consistent with the other requirements of the Act that in every adult-oriented establishment the interior portions of the "booths, cubicles, rooms or stalls, wherein adult entertainment is provided" be configured so that visibility is not blocked and they are readily accessible at all times. Tenn. Code Ann. § 7-51-1113(f) and (g).[8]

The Sixth Circuit found that application of the narrowing construction to the challenged definitions of the Act, "adult cabaret," "adult entertainment," and

[8] Tenn. Code Ann. § 7-51-1113, (Resp. App. 1-3), requires, in part

> (f) Every adult-oriented establishment shall be physically arranged in such a manner that the entire interior portion of the booths, cubicles, rooms or stalls, wherein adult entertainment is provided, shall be visible from the common area of the premises. Visibility shall not be blocked or obscured by doors, curtains, partitions, drapes or any other obstruction whatsoever.
>
> (g) The operator shall be responsible for and shall provide that any room or area used for the purpose of viewing adult-oriented motion pictures or other types of live adult entertainment shall be readily accessible at all times and shall be continuously opened to view in its entirety

"adult-oriented establishments," in Tenn. Code Ann. § 7-51-1102(2), (3), and (6), (Pet. App. 24) is consistent with Tennessee statutory construction principles.[9]

> In construing statutes, it is our duty to adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution. . . . When faced with a choice between constructions, one of which will sustain the validity of the statute and avoid a conflict with the Constitution and another which renders the statute unconstitutional, we must choose the former.

Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 529-30 (Tenn. 1993). Accordingly, since two plausible constructions of the statute may exist, the Sixth Circuit acted consistent with this Court's precedent (and Tennessee law) by rejecting the most expansive reading and adopting the narrowing construction supported by the government defendants.

This is not the unique case that might call for a departure from this Court's normal practice of "defer[ring] to the construction of a state statute given it by the lower federal courts . . . to reflect [the Court's] belief that district courts and courts of

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[9] Furthermore, as previously noted, the Act's provisions are severable and subject to elision if any particular words, clauses, sentences or provisions are unconstitutional. *See* Tenn. Code Ann. § 1-3-110.

appeals are better schooled in and more able to interpret the laws of their respective States." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *see Virginia v. American Booksellers Assn.*, 484 U.S. 383, 395 (1988) ("This Court rarely reviews a construction of state law agreed upon by the two lower federal courts"). The lower courts' findings (Pet. App. 7-42; Pet. App. 58-67), in which they reasonably rejected Petitioners' expansive interpretation of the scope of the Act, are thus entitled to deference.

The lower courts did not commit error by accepting the plausible narrowing construction of the text of the Act proffered by the government respondents. "Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis, for '[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (quoting *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, n.5 (1982)).

The Sixth Circuit's decision in this case comports with its own prior decisions in which it rejected overbreadth claims in regard to regulations of nudity and public sexual conduct or contact. *See J.L. Spoons, Inc. v. Gragani*, 538 F.3d 379, 382-85 (6th Cir. 2008), *cert. denied*, 130 S.Ct. 53 (2009); *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 300 (6th Cir. 2008) (upholding a local ordinance, the Sixth Circuit rejected an overbreadth challenge, finding that "a

regulation banning total nudity in sexually-oriented businesses is far narrower than a similar regulation applicable to the general public"). In *J. L. Spoons*, the Sixth Circuit rejected a substantially similar challenge by Ohio strip club owners claiming that regulations of "nudity" and "sexual conduct or sexual contact" in establishments holding a liquor permit is unconstitutionally overbroad. As in the instant case, Judith Lynn Hanna, Ph.D., a cultural anthropologist and sociologist, testified for the plaintiffs as an expert witness at the preliminary injunction hearing claiming that a variety of "mainstream" ballet, modern dance, and theatrical productions allegedly involving types of nudity and sexual contact could be prohibited by Ohio's law. Rejecting her claims, the Sixth Circuit correctly concluded that Ohio's regulation is a "constitutional, content-neutral regulation of the undesirable secondary effects, including prostitution, drug trafficking, and assault, associated with nude dancing in an environment serving alcohol, [that] is not overbroad." 538 F.3d at 382. The Sixth Circuit found that the strip club owners failed to carry their burden of showing that the government regulation was substantially overbroad by encompassing mainstream works of art:

> While there may be legitimate artistic works that involve actors appearing in a state of nudity, "being in a state of nudity is not an inherently expressive condition" that is protected by the First Amendment. *Pap's*, 529 U.S. at 289. Moreover, the First Amendment does not provide a right to

> engage in sexual activity in public. The effect of [the Ohio Law] on legitimate artistic works is incidental and does not call for the "strong medicine" of overbreadth doctrine.

J.L. Spoons, 538 F.3d at 384-85.

The lower courts in this case distinguished decisions involving ordinances that prohibited nudity and sexual conduct at a wide array of public places and that did not contain any language readily susceptible to a limiting construction. (Pet. App. 22-27; Pet. App. 64-66). *See, e.g.*, *Odle*, 371 F.3d at 395-99 (ordinance that prohibited nudity and sexually suggestive acts in any public place where liquor was sold, served, or consumed found overbroad);[10] *Triplett Grille v. City of Akron*, 430 F.3d 129, 131, n.2, 135-36 (6th Cir. 1994) (general public indecency ordinance found overbroad because, based upon moral outrage, it prohibited nudity in all public places, without excepting "live performances with serious literary, artistic, or political value").

Likewise the Sixth Circuit's decision does not substantially conflict with those of other circuits that have found unconstitutional overbreadth in regard to "public place" regulations that restricted sexually

[10] *Odle* did not involve an application of a limiting construction but instead involved the rejection of the argument that no establishments existed in that rural county wherein mainstream entertainment with serious artistic or literary value was likely to be presented (a no harm, no-foul type argument) 421 F.3d at 393-99.

explicit conduct at any establishment licensed to sell alcoholic beverages or liquor. *Cf. Conchatta, Inc. v. Miller*, 458 F.3d 258 (3rd Cir. 2006), *cert denied*, 127 S.Ct. 1330 (2007) (finding overbroad a liquor statute and regulation that prohibited "lewd entertainment" in venues where alcohol was served); *Giovani Carandola v. Bason*, 303 F.3d 507 (4th Cir. 2002) (finding overbroad a liquor law prohibiting certain sexually explicit conduct in any venue licensed to sell liquor). The "public place" laws in both of these cases, like the ordinance in *Odle*, clearly applied to a substantial number of mainstream entertainment venues not associated with deleterious secondary effects and were not susceptible to a narrowing construction. These cases do not conflict with the Sixth Circuit's holding in this case involving the Act, which applies to adult-oriented establishments that are not likely to encompass mainstream entertainment venues and productions.

Tennessee's Act "is not invalid simply because some impermissible applications are conceivable." *Ferber*, 458 U.S. 747, 772 (1982). Any arguably impermissible application of the Act to citizens engaged in artistic expression amounts to no more than a fraction of the Act's legitimate reach. Indeed, like the Sixth Circuit in this case, other circuits have found that a statute is not unconstitutionally overbroad simply because it is possible to imagine hypothetical examples of protected nudity or conduct that might occur in the venues that are not exempt under the law. Under the overbreadth doctrine, these

hypothetical examples in which the law may be imagined to be overbroad must be "substantial" in comparison to the legitimate sweep of the law. *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1086 (4th Cir. 2006). For example, in upholding an ordinance requiring "adult cabaret dancers" to remain two feet away from patrons during performances, the Ninth Circuit observed that "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Gammoh v. City of La Habra*, 395 F.3d 1114, 1119-22 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 374 (2005). "Even if the [Plaintiffs] were able to identify performances that fulfill all aspects of an 'adult cabaret' that are not tied to the secondary effects the statute is designed to address." *Id.* at 1121-22 (9th Cir. 2005) (quoting *Member of City Counsel of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)). The Ninth Circuit found that the prohibitions in the ordinance applied only to dancers at "adult cabaret" establishments, which are commonly associated with deleterious secondary effects. The court thus found unpersuasive the allegations that a duet, a tango, or an Elvis impersonator, may fall within the ordinance's restrictions. *Id.* at 1121-22.

Having rejected Petitioners' definitional overbreadth claims, the Sixth Circuit also concluded that the prohibitions contained in Tenn. Code Ann. § 7-51-1114(b) and (c) (Pet. App. 87) do not unconstitutionally burden protected speech that is not

reasonably related to reducing deleterious secondary effects.[11] (Pet. App. 29-40). A natural reading of Tenn. Code Ann. § 7-51-1114 as a whole led the Sixth Circuit to conclude that subsection (b)[12] does not prohibit self-touching, as claimed by Petitioners. (Pet. App. 29-37).[13] The "self-touch" prohibition expressly stated in Tenn. Code Ann. § 7-51-1114(d)(1)(D) prohibits an entertainer from "fondling" one's "own genitals or those of another." (Pet. App. 87-88). This prohibition does not substantially burden protected speech in a manner not reasonably related to reducing public health concerns.

Restrictions regarding "simulated" sexual activities, and "fondling" of specified body areas (the

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[11] Petitioners do not seriously contest the validity of the Act's prohibitions of employees or entertainers performing "sexual intercourse or oral or anal copulation" or from engaging in "deviant sexual conduct." Tenn. Code Ann. § 7-51-1114(a) and (d)(1)(B). (Pet. App. 87).

[12] Tenn. Code Ann. 7-51-1114(b) states:

> (b) No operator, entertainer or employee of an adult-oriented establishment shall encourage or permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any operator, entertainer or employee.

Even Petitioners' witness, Dr. Hanna, acknowledged on cross-examination that subsection -1114(b) does not prohibit self-touch. *Entertainment Productions v. Shelby County*, Case No. 2:08-CV-02047-BBD-tmp (W.D. Tenn.), Transcript of April 11, 2008 Hearing Proceedings, p. 79.

[13] Also contrary to Petitioners' implication, the Act does not prevent the exposure of the bare female breast, except for the nipple. Tenn. Code Ann. § 7-51-1114(d)(2). (Pet. App. 88).

breast, buttock, anus, vulva, or genitals), plus an anti-nudity prohibition that requires the erotic dancers to wear pasties and g-strings, which are contained in a North Carolina regulation of establishments permitted to sell alcoholic beverages, were upheld by the Fourth Circuit as not being unconstitutionally vague or facially overbroad *Giovani Carandola*, 470 F.3d at 1078-85; *see Barnes*, 501 U.S. at 571 (plurality opinion) ("[T]he requirement that the dancers don pasties and g-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic").

Following this Court's precedent, the lower courts have addressed overbreadth challenges involving sexually explicit speech and adult-oriented establishments on a case-by-case basis. No substantial conflict among the circuits exists; there is no demonstrated need for this Court's intervention.

B. The Lower Courts Correctly Concluded That The Act Is Constitutionally Valid Under Intermediate Scrutiny And Would Not Result In An Invalid Substantial Reduction Of The Quantity And Availability Of Speech, Which Is Consistent With *City Of Los Angeles V. Alameda Books*, 535 U.S. 425 (2002).

The Sixth Circuit's rejection of Petitioners' claim that enforcement of the Act will result in an unconstitutional reduction in the "quantity and accessibility of speech" does not conflict with the

precedent of this Court. (Pet. App. 42; Pet. App. 54-58). Although Justice Kennedy has expressed the view that the Government cannot intend to reduce secondary effects in half by correspondingly reducing the number of adult-oriented establishments by the same proportion. *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 449-51 (2002) (Kennedy, J., concurring). This Court has never declared invalid an otherwise constitutional regulation of adult-oriented establishments merely because the proprietors assert that they will voluntarily cease presenting adult entertainment – a consequence that is neither the intent nor a requirement of the challenged law. There is no showing that the reductions in secondary effects sought through implementation of the Act was intended by the Tennessee legislature to be achieved by a proportional reduction in the number of adult-oriented establishments or the availability of protected speech.

The intermediate scrutiny test in *Renton*, 475 U.S. at 54, requires that the Government provide a reasonable opportunity to open and operate a sexually-oriented establishment, which the Act allows. Accordingly, the lower courts rejected Petitioners' claim that the Act will virtually eliminate all sexually-oriented speech within Memphis. As the district court found, "[n]othing in the Act suggests that [Petitioners'] rights to operate such a business would be foreclosed." (Pet. App. 56). The district court found "it is clear that the purpose of Act is to minimize the deleterious secondary effects of

sexually-oriented businesses rather than to reduce sexual speech." (Pet. App. 57-58). The district court further found that the Act does not foreclose the Petitioners' right to operate a business, specifically noting the constitutional validity of prohibitions against serving or consuming alcoholic beverages on the premises; requirements of a six-foot distance between performing entertainers and other entertainers, employees or customers; and prohibitions concerning the degree of nudity allowed in adult-oriented establishments. (Pet. App. 56-57).

Although the Act does not facially prohibit them from operating, Petitioners contend that rather than operate in compliance with the law, they would voluntarily choose to cease presenting adult entertainment. As noted by the district court, the Act's licensing and related regulations are the same or substantially similar to provisions contained in other sexually-oriented business establishment regulations upheld by this Court, as well as the Sixth and other circuit courts. (Pet. App. 56-57). For example, lower courts have held that adult-oriented establishments and entertainers may be required to obtain licenses;[14] may be required to maintain a (three to six-foot)

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[14] *See, e.g., Richland Bookmart v. Knox County, Tenn.*, 555 F.3d at 532-33; *Odle*, 421 F.3d at 389-92; *Déjà Vu of Nashville v. Metropolitan Gov't of Nashville and Davidson County*, 274 F.3d 377, 390-96 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002).

buffer during performances;[15] and may be prohibited from presenting totally nude erotic dancing.[16]

Petitioners' principal economic complaint regards the Act's prohibition of the sale, service, or consumption of alcoholic beverages on the premises of adult-oriented establishments. (Pet. App. 56) (*see* Tenn. Code Ann. § 7-51-1109(a)(5), Resp. App. 1). But the federal courts have upheld similar laws prohibiting adult-oriented establishments from selling alcoholic beverages in order to prevent deleterious secondary effects arising from the "explosive combination of nude dancing and alcohol consumption." *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 708 (7th Cir. 2003). The Act does not violate any constitutionally protected right to both sell and serve or consume alcoholic beverages on premises offering adult-oriented entertainment.

This Court, as well as lower federal courts, have long and consistently upheld ordinances that prohibit

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[15] The Act's precise six-foot buffer requirement was upheld in *DLS, Inc.*, 107 F.3d at 410-13. Similarly-worded buffer provisions were upheld in *Richland Bookmart v. Knox County, Tenn.*, 555 F.3d 512, 532 (6th Cir. 2009); *Déjà Vu of Nashville*, 274 F.3d at 396; *see also 729, Inc. v. Kenton County, Ky.*, 515 F.3d 485, 492 (6th Cir. 2008) (upholding a five-foot buffer between customers and entertainers for one hour after performing semi-nude on stage).

[16] *Pap's*, 529 U.S. at 284; *Barnes*, 501 U.S. 560 (1991), *see also Richland Bookmart v. Knox County, Tenn.*, 555 F.3d at 528-31 (each upheld an ordinance interpreted as effectively prohibiting total "nudity" in sexually-oriented establishments).

the sale of alcoholic beverages for on-premises consumption in establishments that offer topless female dancing. *See, e.g., California v. LaRue*, 409 U.S. 109, 114 (1972) (the Government's "conclusion . . . that certain sexual performances and the dispensation of [alcoholic beverages] ought not to occur at premises that have licenses was not an irrational one.");[17] *Richland Bookmart v. Knox County, Tenn.*, 555 F.3d at 531-32 (upholding ordinance prohibiting the sale, use, or consumption of alcohol on-premises of sexually-oriented businesses); *G.M. Enterprises, Inc. v. Town of St. Joseph, Wisc.*, 350 F.3d 631, 636 (7th Cir. 2003) (quoting *Ben's Bar*, 316 F.3d at 722-727) (finding there is no constitutional entitlement to purchase and drink alcohol while watching nude or semi-nude dancing "at the same time and in the same place"); *Sammy's of Mobile, Ltd. v. The City of Mobile*, 140 F.3d 993, 995-99 (11th Cir. 1998), *cert. denied*, 120 S.Ct. 1553 (2000) (holding that ordinance

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[17] This principle was reaffirmed in *44 Liquor Mart v. Rhode Island*, 517 U.S. 484 (1996). "[E]ntirely apart from the 21st Amendment, the state has the [inherent police] power to prohibit the sale of alcoholic beverages in inappropriate places." *Id.*, 517 U.S. at 515. Under the *Barnes-O'Brien* intermediate scrutiny test, even after *44 Liquor Mart*, *LaRue*, "would come out the same way." *Id. See also, e.g., City of Newport v. Iacobucci*, 479 U.S. 92, 95 (1986) (upholding city ordinance prohibiting semi-nude dancing in establishments licensed to sell liquor for on premises consumption); *New York Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981) (upholding ban of the sale of liquor on premises where topless dancing occurs, noting "common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior").

prohibiting alcohol on the premises of adult-oriented establishments did not ban nude dancing, noting, "we are unaware of any constitutional right to drink while watching nude dancing").

"[T]he deprivation of alcohol does not prevent the observer from witnessing nude or semi-nude dancing, or the dancer from conveying an erotic message." *Ben's Bar*, 316 F.3d at 728. Petitioners do not assert that a patron has to be consuming alcohol to receive whatever "message" is being communicated by the entertainers in adult-oriented establishments – a point confirmed by the testimony of their witness, Dr. Hanna. (*Entertainment Productions v. Shelby County*, Case No. 2:08-CV-02047-BBD-tmp (W.D. Tenn.), Transcript of April 11, 2008, Hearing Proceeding, pp. 82-3).

Having rejected Petitioners' overbreadth and vagueness claims, the Sixth Circuit properly found that it was "unpersuaded that the Act's provisions are 'so onerous' as to cause the majority of Memphis's nightclubs to 'cease presenting adult entertainment entirely.'" (Pet. App. 42). That decision does not conflict with applicable precedent of this Court, nor does it conflict with applicable decisions of the other circuits. This Court's review is therefore unwarranted on this issue as well.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Tenn. Code Ann. § 7-51-1109(a)(5)

(a) The board shall revoke, suspend or annul a license or permit for any of the following reasons:

* * *

(5) Any intoxicating liquor or malt beverage is served or consumed on the premises of the adult-oriented establishment, when an operator, employee, entertainer, or escort knew, or should have known, of the violation and authorized, approved, or, in the exercise of due diligence, failed to take reasonable efforts to prevent the violation[.]

Tenn. Code Ann. § 7-51-1113

(a) The operator shall maintain a register of all employees, entertainers, or escorts, showing for each person the name, permit number issued under this part, any aliases used, home address, age, birth date, sex, height, weight, color of hair and eyes, telephone number, social security number, driver license number, date of employment and termination, and duties associated with the adult-oriented establishment. This information on each employee shall be maintained in the register on the premises for a period of three (3) years following termination.

(b) The operator shall make the register of employees available immediately for inspection by the board or sheriff's department upon demand of a

member of the board or sheriff's department at all reasonable times.

(c) Every act or omission by an employee constituting a violation of the provisions of this part shall be deemed the act or omission of the operator if such act or omission occurs either with the authorization, knowledge, or approval of the operator, or as a result of the operator's negligent failure to supervise the employee's conduct, and the operator shall be punishable for such act or omission in the same manner as if the operator committed the act or caused the omission.

(d) An operator shall be responsible for supervising the conduct of all entertainers and employees while on the licensed premises, and shall exercise due diligence in taking reasonable efforts to prevent acts or omissions of any entertainers or employees constituting a violation of the provisions of this part, with the operator's failure to reasonably fulfill this duty constituting a ground for determining whether the operator's license shall be revoked, suspended or renewed.

(e) No employee of an adult-oriented establishment shall allow any minor to loiter around or to frequent an adult-oriented establishment or to allow any minor to view adult entertainment as defined in this part.

(f) Every adult-oriented establishment shall be physically arranged in such a manner that the entire interior portion of the booths, cubicles, rooms or

stalls, wherein adult entertainment is provided, shall be visible from the common area of the premises. Visibility shall not be blocked or obscured by doors, curtains, partitions, drapes or any other obstruction whatsoever.

(g) The operator shall be responsible for and shall provide that any room or area used for the purpose of viewing adult-oriented motion pictures or other types of live adult entertainment shall be readily accessible at all times and shall be continuously opened to view in its entirety.

(h) The license shall be conspicuously displayed in the common area of the premises at all times.

(i) The permit shall be kept by an employee, entertainer, or escort so that it is readily available for display immediately upon request by any member of the county sheriff's department or other appropriate law enforcement official, any board member, or any person designated by the board to assist it in enforcing this part. Each employee, entertainer, or escort shall immediately display or disclose the employee, entertainer, or escort's valid permit number to any customer upon request.